Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

FELICIANO LEJANO AND MELINDA LEJANO,

Petitioners,

VS.

K.S. BANDAK ASSURANCEFORENINGEN GARD, AND K.S. BANDAK, II,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether or not the Louisiana Supreme Court erred in enforcing a forum selection clause by applying federal procedural law instead of state procedural law.

II. If the Louisiana Supreme Court was correct in applying federal law, did it err in its interpretation of the General Maritime Law by enforcing a forum selection clause found in a document that was in a language that the plaintiff seaman could not read and to which the defendants were not parties, and by placing the burden of proof on petitioner, a seaman and ward of this Court.

III. Whether or not an American court may rely upon an erroneous interpretation of foreign laws where the laws of the other alternative forums, if applied correctly, would not enforce a forum selection clause in the document signed by the seamen.

LIST OF PARTIES

The parties to the action are Feliciano Lejano, Melinda Lejano, K.S. Bandak, Assuranceforeningen Gard, K.S. Bandak, II, A.S. Borgestad and A.S. Borgestad Shipping.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Feliciano Lejano and Melinda Lejano, respectfully pray that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of the State of Louisiana entered on December 12, 1997.

OPINIONS BELOW

All opinions below are contained in the appendices to this Petition. The Judgment and Opinion of August 3, 1994 of the district court, the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, is reproduced in the Appendix, A-33-38 and is also reported at 1994 A.M.C. 2962. The Opinion of the Court of Appeal for the Fifth Circuit of the State of Louisiana of March 1, 1995 reversing the district court is contained in the Appendix, A-39-46 and is reported at 651 So.2d 997 (La. App. 5th Cir. 1995). The Judgment and Opinion of the district court of September 21, 1995 again dismissing plaintiffs' case on the grounds of forum selection clause and ordering that the case be filed in Norway or the Philippines is contained in the Appendix, A-47-50. The Judgment and Opinion of the district court of November 16, 1995 denying plaintiffs' application for a new trial is contained in the Appendix, A-50-54. The Opinion of the Court of Appeal for the Fifth Circuit for the State of Louisiana of January 9, 1996 refusing petitioners' application for a supervisory writ is contained in the Appendix, A-55-56. The Order of the Louisiana Supreme Court of March 29, 1996 granting petitioners' application for a supervisory writ and remanding to the Court of Appeal for the Fifth Circuit for briefing and opinion is contained in the Appendix, A-57 and is reported at 670 So.2d 1223. The

Opinion of the Court of Appeal for the Fifth Circuit for the State of Louisiana of January 15, 1997 on remand from the Louisiana Supreme Court enforcing the forum selection clause is contained in the Appendix, A-58-71 and is reported at 688 So.2d 86. The Order of the Louisiana Supreme Court of April 4, 1997 granting petitioners' application for certiorari is contained in the Appendix, A-72 and is reported at 692 So.2d 407. The Opinion of the Louisiana Supreme Court of December 12, 1997 enforcing the forum selection clause is contained in the Appendix, A-1-32 and is reported at 705 So.2d 158. The Order of the Louisiana Supreme Court of March 27, 1998 denying petitioners' application for rehearing and the dissent of three members of the Court is contained in the Appendix, A-72-74 and is reported at ___ So.2d ___.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court (Appendix, A-1-32) was entered on December 12, 1997. Rehearing was denied on March 27, 1998. (Appendix, A-72-74) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution (Appendix, A-75); 28 U.S.C. § 1333 (Appendix, A-75); 46 U.S.C. § 688 (Appendix, A-75); 45 U.S.C. § 55 (Appendix, A-76); 45 U.S.C. § 56 (Appendix, A-76);

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, September 16, 1988 (Appendix, A-77); Article 17, Section 5 (Appendix, A-77); Memorandum Order No. 271, Republic of the Philippines; The Migrant Workers Act, Philippine Republic Act No. 8042, June 7, 1995, §§ 1, 2, 4, 10, 24-27, 30 (Appendix, A-78-82).

STATEMENT OF CASE

On November 7, 1991, petitioner, Feliciano Lejano was injured on board the M/V Bandak while the vessel was in the straits of Florida after sailing from Mobile, Alabama. A rope broke which had been holding a suspended scaffold upon which Mr. Lejano had been ordered to work, causing him to fall to the deck of the vessel. Mr. Lejano was taken to the Jackson Memorial Hospital, Miami, Florida, by United States Coast Guard helicopter where he remained for an extended period of time and incurred medical bills in the amount of $322,603.04. He was thereafter repatriated to the Philippines where he remained in the hospital for an additional ten month period of time. Mr. Lejano was then discharged from the hospital without any provisions being made by the shipowner for his future care. Mr. Lejano's injuries are permanent and he suffers from irreversible paralysis and brain damage.

On September 16, 1993, Mr. Lejano and his wife brought suit in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, seeking recovery under the Jones Act, 46 U.S.C. § 688, the General Maritime Law, and

alternatively the laws of both the Republic of the Philippines and Norway. Quasi-in-rem jurisdiction over the defendants was obtained by the execution of a non-resident writ of attachment on the M/V Bandak. The vessel was engaged in world-wide trading, but frequented the United States and Louisiana ports more than any other ports in the world. After the attachment, the defendants posted security for Mr. Lejano's claims in the amount of $8,750,000.00 and the vessel was released. By way of peremptory exceptions of no right and no cause of action filed by the defendants, dismissal of the case was sought on the basis of forum non conveniens and a forum selection clause in petitioner's alleged contract of employment. On August 3, 1994, the district court granted the peremptory exceptions dismissing the case on the basis of forum non conveniens and in its opinion noted that petitioners' " . . . employment contract, the revised standard employment contract, and the collective bargaining agreement, applicable to the employment relationship required that disputes be resolved in Norway or the Philippines." Petitioners timely appealed to the Court of Appeal for the Fifth Circuit of the State of Louisiana and on March 1, 1995, the appellate court reversed the district court's judgment of August 3, 1994 remanding the case for trial.

Following the remand to the district court, the case was set for trial commencing on August 31, 1995 and was subsequently re-assigned to October 31, 1995. Defendants filed a motion for partial summary judgment urging the application of Norwegian substantive law at the forthcoming trial. Petitioners opposed the motion for summary judgment and alternatively urged that the

substantive provisions of Philippine law should be applied at the forthcoming trial noting that such provisions of Philippine law were virtually identical to the General Maritime Law of the United States and the Jones Act negligence cause of action, 46 U.S.C. § 688.

By judgment and opinion dated September 21, 1995, the district court again dismissed plaintiffs' case on the grounds of the forum selection clause and ordered that the case be filed in Norway or the Philippines. Petitioners' application for a new trial was denied on November 16, 1995. Petitioners' application for a supervisory writ to the Louisiana Court of Appeal for the Fifth Circuit was denied on January 6, 1996. On March 29, 1996, the Louisiana Supreme Court granted petitioners' application for a supervisory writ and remanded the case to the Court of Appeal for the Fifth Circuit for briefing and opinion. On January 15, 1997, the Louisiana Court of Appeal for the Fifth Circuit entered an opinion enforcing the forum selection clause.

On April 4, 1997, the Louisiana Supreme Court granted petitioners' application for certiorari. On December 12, 1997, the Louisiana Supreme Court entered an opinion enforcing the forum selection clause despite the fact that the documents were written in a language petitioner did not understand and despite the fact that defendants were not even parties to the documents containing the forum selection clause.

In its opinion of December 12, 1997, the Louisiana Supreme Court noted that " . . . the validity and interpretation of forum selection clauses are regarded as procedural," "and they are generally controlled by state law." The Louisiana Supreme Court then stated:

> "However, the United States Supreme Court has determined that in admiralty cases, federal law governs the enforceability of forum selection clauses. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).
>
> Although Mr. Lejano's underlying claims are based on tort law under the Jones Act and Federal Maritime Law, the contested forum selection clause is contained in his employment contract."
>
> * * *
>
> . . . Therefore, we find that the courts of this state sitting in admiralty should examine the validity and enforceability of forum selection clauses in accordance with federal law and standards.
>
> Forum selection clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.' *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972). Id. at 166.

The Louisiana Supreme Court, placing the burden of proof upon petitioner, then found the forum selection clause to be enforceable because "Mr. Lejano has failed to make a clear showing that enforcement would be unreasonable, unjust, fraudulent or overreaching." The court reasoned that it made no difference that Mr. Lejano could

not read the forum selection clause because it was in a foreign language:

> "Mr. Lejano's claim that he did not understand the language in which it was written is of no consequence in light of the Philippine employment service's structure, the fact that the POEA acted on his behalf in negotiating and bargaining for the terms of the contract, and the fact that Mr. Lejano signed the POEA-approved contract, therefore submitting to the terms thereof, and consequently being afforded any benefits and advantages of other provisions of the contract." Id. at 168.

The Louisiana Supreme Court further noted that the contract in question "would be enforceable under the laws" of the Philippines and that it was not a contract of adhesion. The Louisiana Supreme Court further found that it was not necessary to make a choice of law analysis pursuant to the *Lauritzen-Rhoditis*[1] factors:

> "Because we find that the forum selection clause contained in the employment contract was enforceable, we decline to make a determination of the applicable substantive law by analyzing the case pursuant to the *Lauritzen-Rhoditis* choice of law test." Id. at 169.

The statute of limitations has run on Mr. Lejano's claim in both Norway and the Philippines and is thus barred by prescription.

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[1] 398 U.S. 306 (1970); 345 U.S. 571 (1953).

ARGUMENT

I. The Louisiana Supreme Court Erred in Enforcing a Forum Selection Clause by Applying Federal Procedural Law in Lieu of State Procedural Law.

The Louisiana Supreme Court properly noted that this maritime tort case falls within the admiralty jurisdiction but did so for the wrong reason, stating that " . . . a contract for hire of a ship or of the officers and sailors to man her falls within admiralty jurisdiction. *Kossich v. United Fruit Co.*, 365 U.S. 731 (1961)." The Louisiana Supreme Court continued on an erroneous path by then applying contractual principles to a tort action and failing to note the distinction between procedural and substantive laws.

This case falls within admiralty jurisdiction not because of the alleged contract but because it was a tort claim by a seaman who was injured on a vessel to which he was permanently assigned on navigable waters, thereby meeting all of the tests required to be within the admiralty tort jurisdiction. See, Schoenbaum, *Admiralty & Maritime Law*, Second Edition, *Practitioner Treatise Series*, Vol. 1, 1994, Chapter 3, § 5, "Admiralty Tort Jurisdiction," Chapter 3, § 7, "Seamen." With admiralty jurisdiction comes the application of the substantive admiralty law. *Grubart v. Great Lakes Dredge & Dock Company*, 513 U.S. 1024 (1995). There is a significant difference in admiralty between the applicable substantive law and the procedural law to be applied.

It is a well-established principle of federal law that, in exercising in personam jurisdiction over maritime actions under the "saving to suitors clause" 28 U.S.C.

§ 1331(1), a state court applies its own procedural law. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). Both the courts and the academic world are in complete agreement that a "forum selection clause" is nothing more than a matter of venue governed entirely by the procedural rules of the forum. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) en banc (per curiam), aff'd, 487 U.S. 22 (1988); *Jones v. Wiebrecht*, 901 F.2d 17, 19 (2d Cir. 1991) ("[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature"). See also, Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham Law Review 291 at 325 (" . . . forum-selection clauses are a part of the procedural venue, a view the United States Supreme Court endorses . . . ").

This Court has recently reiterated the principle that state courts follow their own procedural rules in maritime actions in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). In applying the *Miller* principle, this Court concluded that Louisiana was free to reject the doctrine of forum non conveniens in cases like the one at hand, because:

> "Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of ***forum non conveniens***, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: ***it is procedural rather than substantive***, and it is most unlikely to produce uniform results. 114 S.Ct. at 988 (Emphasis added)."

This Court explained that the doctrine of forum non conveniens is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue:

> " . . . but venue is a matter that goes to process rather than substantive rights . . . Just as state courts, in deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of forum non conveniens. 114 S.Ct. at 988."

This Court has repeatedly reiterated the principle that a state is only bound by its own procedural laws. In *Sun Oil Company v. Wortman*, 486 U.S. 717 (1988), this Court held that this principle applied equally even in cases where the forum state lacked the necessary contacts to constitutionally permit the application of the forum's substantive law to the merits of the action:

> "Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts." 100 L.Ed.2d at 752.
>
> * * *
>
> "A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitation. Moreover, petitioner could in no way have been unfairly surprised by the application

to it of a rule that is as old as the Republic." Id. at 757.

Although *Wortman* was not a maritime case, it is very relevant to the case at hand because, by allowing the state court to apply its own procedural law, *Wortman* allowed that court to entertain an action which had been barred by the prescription law of all other involved states and which, pursuant to an earlier decision of the Supreme Court, *could not* be governed by the substantive law of the forum state.

Thus, under the above federal precedents, there is no doubt that Louisiana courts are to only apply state procedural law to all cases properly before them. The effect of enforcing a forum selection clause is a derogation of the State of Louisiana's sovereign legislative right to enact and enforce its own procedural venue rules. The Louisiana Supreme Court clearly applied the wrong law and committed reversible error when it applied its perception of federal procedural common law.

The Louisiana Supreme Court erred by not distinguishing between substantive law and procedural law. The state court wrote " . . . the United States Supreme Court has determined that in admiralty cases, federal law governs the enforceability of forum selection clauses." *Lejano* at 166. This is only correct when federal procedural law is applied in a federal court or in cases in which the federal courts have determined that forum selection clauses are mandated by federal statutory provisions, e.g., *Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 462 (1995), or possibly in cases involving non-seafarers, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

It is clear that the Louisiana Supreme Court applied federal procedural common law, relying upon federal jurisprudence, as it declined to determine the applicable substantive law under the factors set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970). Because the Louisiana Supreme Court followed its perception of federal procedural rules instead of state procedural rules, the decision of the Louisiana Supreme Court should be reversed and this case remanded for adjudication under the Louisiana Code of Civil Procedure.

II. If the Louisiana Supreme Court was Correct in Applying Federal Law, it Erred in its Interpretation of the General Maritime Law and in Enforcing a Forum Selection Clause in a Document that was in a Language that the Seaman Could Not Read and to Which the Defendants were not Parties, and Placing the Burden of Proof upon the Seaman.

If this Court determines that a forum selection clause has a life of its own and in some way is a part of the substantive maritime law, the Louisiana Supreme Court erred in enforcing the clause against petitioner, a seaman who is a ward of this Court. As a preliminary matter, the Louisiana Supreme Court correctly noted that petitioners' claims " . . . are based on tort law under the Jones Act and federal maritime law . . . ". *Lejano* at 166. Even in the *M/S Bremen*, this Court indicated that a forum selection clause should not be enforced against an employee covered by the Federal Employees Liability Act. Petitioner herein

should be considered such an employee, as the Federal Employees Liability Act is expressly incorporated into the Jones Act. The *Bremen* court stated:

> "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, e.g., *Boyd v. Grand Trunk, W.R. Co.*, 338 U.S. 263 (1949)." *Bremen* at 407 U.S. 15.

In *Boyd*, this Court specifically held that any agreement restricting the choice of venue awarded by the Federal Employees Liability Act is null and void as being in conflict with Section 5 of that Act, 45 U.S.C. § 55 which provides in pertinent part:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . . ".

This Court cited with approval in *Boyd*, its earlier decision of *Duncan v. Thompson*, 315 U.S. 1 (1942). In *Duncan*, this Court held that a railway employee's rights may not be contractually limited because of the proscriptions of Section 5 of the Federal Employees Liability Act.

Like the Jones Act, 46 U.S.C. § 688, and the General Maritime Law also prohibit the enforcement of any provision in a seaman's contract limiting his rights. The policy of the United States as set forth in this country's General Maritime Law expressly prohibits enforcing any stipulation in a seaman's contract of employment that limits his action for damages resulting from negligence or

unseaworthiness. *Blanco v. Phoenix Compania De Navega*, 304 F.2d 13 (4th Cir. 1962).

In *Blanco*, a Spanish seaman sought damages against the Liberian shipowner for his injuries arising out of the vessel's unseaworthiness. The issue before the court was:

> " . . . whether a ship and her owner may limit liability to a seaman under the General Maritime Law by stipulating in the contract of employment the maximum monetary recovery for scheduled personal injuries." Id.

The court held the stipulation invalid as a matter of law noting:

> "Moreover, certain decisions go further, strongly indicating that any attempt whatever by a ship to limit its liability to a seaman under the General Maritime Law is against public policy and ipso facto void, irrespective of the fairness of the terms of the agreement. This is the express holding of *W.J. McCahan Sugar Refining & Molasses Co. v. Stoffel*, 41 F.2d 651, 653-654 (3d Cir. 1930) (post-accident agreement that state workman's compensation shall be the seaman's sole remedy); *Schellenger v. Zubik*, 170 F.Supp. 92, 92 (W.D. Pa. 1959) (agreement to accept state workman's compensation); *Vitco v. Joncich*, 130 F.Supp. 945, 950-952 (S.D. Cal. 1955) (contract providing that seaman's right to wages ended if he became ill during the voyage; excellent collection of cases); *Lakos v. Saliaris*, 116 F.2d 440, 443-444 (4th Cir. 1940) (agreement modifying seaman's right to full wages at the end of the voyage contrary to United States statutory law); *Retzekas v. Vygla S.S. Co.*, 193 F.Supp. 259 (D.R.I. 1960) (contract providing that personal injury

claims of seamen shall be governed by Greek law.)

These authorities are not without support in the Supreme Court. In *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 371, 53 S.Ct. 173, 77 L.Ed. 368 (1932), Justice Cardozo, after discussing the duty imposed by the law upon a ship to provide, as an incident of the employment, maintenance and cure to a seaman who falls ill during a voyage and to indemnify him for loss or damage caused by an unseaworthy condition, states categorically: '[G]iven the relation, no agreement is competent to abrogate the incident.' Again, in *Lauritzen v. Larsen*, 345 U.S. 571, 589, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), though holding that the application of foreign law was proper in a suit between a foreign seaman and a foreign ship, the Court said: 'We think a quite different result would follow if the contract [of employment] attempted to void applicable law.

Literally interpreted, these cases suggest that the private compensation agreement in the present case would be unenforceable even if it afforded the seaman an adequate allowance for his concession. Id. at 15-16.

More recently, the United States Court of Appeal for the Fifth Circuit likewise found a similar stipulation in a seaman's contract of employment to be " . . . unenforceable as contrary to public policy . . . " *Parks v. Dowell Div. of Dow Chemical Corp.*, 712 F.2d 154 (5th Cir. 1983). In *Parks*, the seaman's contract of employment stipulated he was "an independent contractor" and likewise contained an indemnification and hold-harmless agreement.

Not only does the federal common law prohibit enforcement of a forum selection clause in a contract of employment for a seaman, but also, Congress recently refused to change this law. Congress specifically stated that the existing law provides that a forum selection may not be enforced against seafarers when it considered whether or not to amend the **existing** United States law to **allow** enforcement of forum selection clause in foreign seamen's contracts in personal injury and death litigation. In May of 1995, a House floor amendment was made to the Coast Guard Authorization Act requiring enforcement of any *forum selection clause* contained in any foreign seamen's contract of employment and requiring litigation of this personal injury claim in a foreign forum. The proposed amendment would have amended both the Jones Act and the General Maritime Law. This Act passed the House of Representatives. (H.R. 1361).[2] In passing the

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[2] The Act called for an amendment to the Jones Act, 46 U.S.C. § 688. The proposed amendment provided as follows:

"(c) Section 20 of Chapter 153 of the Act of March 4, 1915 (46 App. 688) is amended by adding a new subsection to read as follows:

'(c) Limitation for Certain Aliens in Case of Contractual Alternative Forum:

'(1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent legal resident alien of the United States at the time of the incident giving rise to the action, if the incident giving rise to the action occurred while the person was employed on board a vessel documented other than under the laws of the United States, which vessel was owned by an entity organized other than under the laws of the

Coast Guard Authorization Act, the Senate version deleted, in its entirety, any reference to the forum selection clause provision. (S. 1004). The matter was resolved in Conference Committee. The Committee issued a Conference Report of the Coast Guard Authorization Act of 1966 on September 27, 1996 which stated:

"Section 1129. Cruise Ship Liability.

The Senate bill contains no comparable provision.

Section 430 of the House amendment makes three changes in current maritime law: The first

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United States or by a person who is not a citizen or permanent legal resident alien.

'(2) The provisions of paragraph (1) shall only apply if –

'(A) the incident giving rise to the action occurred while the person bringing the action was a party to a contract of employment or was subject to a collective bargaining agreement which, by its terms, provided for an exclusive forum for resolution of all such disputes or action in a nation other than the United States, a remedy is available to the person under the laws of that nation, and the party seeking to dismiss an action under paragraph (1) is willing to stipulate to jurisdiction under the laws of such nation as to such incident; or

'(B) a remedy is available to the person bringing the action under the laws of the nation in which the person maintained citizenship or permanent residency at the time of the incident giving rise to the action and the party seeking to dismiss an action under paragraph (1) is willing to stipulate to jurisdiction under the laws of such nation as to such incident.

'(3) The provisions of paragraph (1) of this subsection shall not be interpreted to require a court in the United States to accept jurisdiction of any actions.'

> allows foreign shipowners to provide that foreign crew members must bring lawsuits for damage involving injury or death in appropriate foreign courts."[3]

As noted, the Conference Committee refused to adopt the House version and this "change" in the law was rejected. The Conference Report makes it absolutely clear that the "current law" will not enforce a forum selection clause in a seaman's contract. This Court has previously noted that Conference Reports are entitled to "great weight." E.g., *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810 (1983).

The refusal of Congress to change existing law is consistent with the special status afforded seamen both by Congress and by the judiciary. This Court reaffirmed the special status afforded a seaman in its opinion in *Garrett v. Moore-McCormack Company*, 317 U.S. 239 (1942) stating:

> "The language of Justice Story, sitting on Circuit in 1823, described the solicitude with which admiralty has traditionally viewed seamen's contracts:
>
> 'They are emphatically the wards of the admiralty; and though not technically capable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. . . . If there

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[3] 142 Cong. Rec. H11485-02, H11522.

> is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable. . . . And on every occasion the court expects to be satisfied that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen." *Harden v. Gordon* 11 F.Cas. 480, 2 Mason 541, No. 6,047.
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> * * *
>
> The analogy suggested by Justice Story, in the paragraph quoted above, between seamen's contracts and those of fiduciaries and beneficiaries remains, under the prevailing rule treating seamen as awards of admiralty, a close one. Whether the transaction under consideration is a contract, sale, or gift between guardian and ward or between trustee and cestui, the burden proving its validity is on the fiduciary. He must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration."

Because of the special status of a seaman as a ward of the admiralty, this Court held in *Garrett* that the General Maritime Law freed the seamen from the burden of proof imposed by the Pennsylvania statute placing the burden of proof on the seaman and deemed the Pennsylvania procedural statute to be "substantive" as to seafarers.

The rule of the *Bremen* placing the burden of proof on the "resisting party" may be valid when the controversy is between two sophisticated corporations such as involved in that litigation. The *Bremen* rule may also be valid in an action by a vessel passenger who had actual notice of the forum selection clause. E.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). However, the burden shifting rule is clearly invalid when applied to a seaman. Additionally, applying the *Bremen* rule to a seaman's action would violate the express holding of this Court in *Garrett* and rendered that case meaningless.

Even in a traditional forum non conveniens analysis, all authorities agree that the burden of proof is upon the defendant seeking the transfer or dismissal to another forum. E.g., *Menendez Rodriguez v. Pan American Life Insurance Co.*, 311 F.2d 429 (1962) which states: "The burden to establish good cause for dismissal is quite plainly upon the defendant, and it is still true that 'unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed.' *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947);" *Contract Lumber Co. v. P. T. Morges Shipping Co., Ltd.*, 918 F.2d 1446, 1449 (9th Cir. 1990) which states: "In a motion to dismiss on the ground of forum non conveniens, 'the burden of proving alternative forum is the defendant's and . . . the remedy must be clear before the case will be dismissed.' *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983);" *Federal Practice and Procedure*, Wright – Miller – Cooper, Vol. 15, § 3828, p. 291 states: "The burden on a defendant moving to dismiss in favor of a foreign court or a state or territorial court is a strong one."

There is also no doubt that all seamen, including foreign seamen are wards of the admiralty. This was the express holding of the Court of Appeal for the Fifth Circuit in *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5th Cir. 1991). The court wrote " . . . courts must remain vigilant in protecting the rights of seamen, whether foreign or domestic, in their relations with their employer. This protection comports with our nation's long history of concern and solicitude for seamen with employment disputes." Id. at 247. This Court has also acknowledged that foreign seamen fall within the ambit of wardship and the protection of the admiralty court. E.g., *Hellenic Lines v. Rhoditis*, 396 U.S. 306 (1870). Congress has also legislatively extended its protection to foreign seamen by statutory enactments as evidenced by extending the protection of the seamen's wage act to foreign seamen. See, 46 U.S.C. § 10313(i). See also, *Castillo* at 243. ("Congress did not limit this statutory coverage to American seamen; rather, Congress extended protection to seamen who serve on a foreign vessel when located in a United States harbor").

The reliance of the Louisiana Supreme Court on this Court's decision in *Carnival Cruise Lines, Inc. v. Shute* is misplaced. As a preliminary matter, the Louisiana court did not consider or address the implication of seaman status on the alleged employment contract in question. In *Carnival*, Mr. Shute was a pleasure cruise passenger, not a seaman, and as such, Mr. Shute was not a ward of the admiralty entitled to the Court's special solicitude and protection. Secondly, this Court acknowledged that Mr. Shute had actual notice of the forum selection clause as opposed to absence of any notice to petitioner, Mr.

Lejano. Finally, the vitality of this Court's decision in *Carnival* is in question. Since the *Carnival* decision, the Limitation of Liability Act, 46 U.S.C. § 183(c), was amended twice and the *Carnival* decision was arguably overruled by Congress.

At the time of the second amendment, Representative Studds made it absolutely clear that the intent of the amendment was to overrule *Carnival:*

> "We do not intend by this amendment to restore the standard rule set by the Supreme Court in its 1991 decision, *Carnival Cruise Lines, Inc. v. Shute*, 139 CONG REC. H10,939 (daily ed. Nov. 23, 1993).

The report discussing the legislation states:

> Section 309 of H.R. 2150 should not be construed to mean that a vessel owner may enforce a forum selection clause in a passenger ticket. American law generally frowns on contracts of adhesion, contracts where the party with all the bargaining power, usually a powerful business, imposes an unfair provision on individual consumers on a take-it-or-leave-it basis.
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> * * *
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> By adoption of this amendment, the Committee does not intend to **reinstate** the opinion of the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*, 139 CONG. REC. H10,941 (daily ed. Nov. 23, 1993).

See discussion by Franklin & Weldy, *Dark of the Night Legislation Takes Aim at Forum Selection Clauses: Statutory Revisions in Relation to Carnival Cruise Lines, Inc. v. Shute*, 6 U.S.F. Mar. L.J. 259 (1994).

Federal district courts correctly refuse to enforce forum selection clauses. *Hodge v. Ocean Quest Intl.*, 1992 AMC 2920 (E.D. La. 1992). In *Hodge*, a clause with nearly identical language as that contained in the employment contract enforced against Mr. Lejano was held to apply in contract, *not* maritime tort actions. The federal court for the District of Oregon considered the identical contract as that sought to be imposed upon Mr. Lejano, and after a full trial on the merits ruled it to be a contract of adhesion. The court considered the economic realities that exist in the Philippines and found that these seamen have no bargaining power. In *Jose v. Fir Grove*, 801 F.Supp. 358 (D. Or. 1992) the court stated:

> "As I learned at trial, unemployment in the Philippines is around 50% and jobs on board vessels are extremely competitive. As a consequence, and as discussed further, infra, employment contracts for seafarers in the Philippines are hardly "negotiated" in the sense that we are familiar with in this country. It is clearly an employer's market and coercion existed as a result of economic forces in that country- . . . However, my choice of phraseology should not give rise to an inference that plaintiffs had any choice over how they might participate in this particular program or that they enjoyed any significant benefits from the scheme. At trial, it became clear that these plaintiffs would have accepted any job on any terms just to have the opportunity to work and support their families." Id. at 369, note 17.

Another district court, refused to enforce a forum selection clause when the defendants were not parties to

the contract, as in this case, and where the forum selection clause was in a language that the seaman could not understand, also as in the case involving Mr. Lejano. *Sablic v. Armada Shipping, APS*, 973 F.Supp. 745 (S.D. Texas 1997).

The forum selection clause in this litigation is invalid as a matter of law. It is in conflict with the Jones Act, specifically Section 5 of the Federal Employees' Liability Act incorporated therein by reference. The forum selection clause is in conflict with the General Maritime Law because the Louisiana Supreme Court placed the burden of proof upon petitioner in violation of this Court's holding in *Garrett v. Moore-McCormack Company*. The Louisiana Supreme Court further erred by failing to treat petitioner, a seaman, as a ward of the admiralty.

III. The Louisiana Supreme Court Relied Upon an Erroneous Interpretation of Foreign Law. The Laws of Both the Philippines and Norway do not allow Enforcement of a Forum Selection Clause in a Document signed by the Seaman.

The Louisiana Supreme Court attempted to bolster its erroneous decision by stating that the forum selection clause would be enforceable under the laws of the Republic of the Philippines. This statement is patently incorrect. Forum selection clauses are not enforceable as a matter of law in either the Republic of the Philippines or Norway.

Recently, the United States District Court for the Southern District of New York considered the identical argument raised by the defendants herein in a maritime action involving a Filipino seaman who had executed the

identical contract with the identical forum selection clause present in this litigation. Not only were the legal issues before the United States District Court the same as those before the Louisiana Supreme Court, the evidence was virtually identical. In *Cuizon v. Kedma, Ltd.*, 1997 WL 37938 (S.D.N.Y.), the United States District Court found exactly opposite to the findings of the Louisiana Supreme Court. The *Cuizon* court found:

1. The POEA contract was a contract of adhesion;

2. The POEA contract forum selection clause applied to contractual disputes and not maritime torts; and

3. Forum selection clauses are not enforceable in the Philippines.

Recent changes in Philippine law clearly establish that the Louisiana Supreme Court was erroneous in stating that the "POEA acted on his [Lejano's] behalf in negotiating and bargaining for the contract" (Lejano at 168) and by further stating that the employment contract drafted and approved by the Philippine government, particularly the POEA would be "enforced within the laws of that country". (Id.) The failure of the POEA to protect Philippine workers resulted in its abolishment as an adjudicatory body. Specifically, on March 20, 1995, the President of the Republic of the Philippines promulgated Executive Order 231 creating a Presidential Fact Finding and Policy Advisory Commission on the Protection of Overseas Filipinos. Executive Order 231 specifically noted that "certain claims and assertions as well as accusations have been made against some officials of the

Philippine government in connection with its efforts to protect overseas Filipinos." (Appendix, A-82)

Retired Supreme Court Justice Emilio A. Gancayco was appointed chairperson of the Presidential Fact Finding and Policy Advisory Commission on the protection of overseas Filipinos and it was thereafter referred to as the Gancayco Commission. (Appendix, A-77) The Gancayco Commission found that the POEA had not properly or effectively performed its task and recommended transferring its limited adjudicatory jurisdiction to the Philippine National Labor Relations Commission. Arguably, the Migrant Workers Act, Philippine Republic Act No. 8042 dated June 7, 1995, removed the adjudicatory powers of the POEA because of its misconduct. Moreso, Section 25 of the Migrant Workers Act established the position of the legal assistance for Migrant Workers Affair under the Department of Foreign Affairs and created a legal assistance Fund of 100,000,000 pesos to assist Filipino workers bringing actions before foreign courts of competent jurisdiction. (Appendix, A-81)

A forum selection clause is likewise unenforceable in Norway. Norway is a signatory to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, September 16, 1988. That Convention specifically provides in Article 17, Subparagraph 5 that forum selection clauses are not enforceable unless ratified after the dispute has arisen stating as follows:

> "In matters relating to individual contacts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen." (Appendix, A-77)

CONCLUSION

The Louisiana Supreme Court erred in enforcing a forum selection clause in documents written in a language that the plaintiff-seaman could not understand and documents to which the defendants were not even parties. The Louisiana Supreme Court erred in applying erroneous perception of federal procedural law instead of following Louisiana procedural law. The Louisiana Supreme Court erred in placing the burden of proof upon Mr. Lejano, a seaman and ward of this Court in violation of this Court's holding in *Garrett v. Moore-McCormack, supra.* The Louisiana Supreme Court erred in finding that a forum selection clause was enforceable under the laws of the Republic of the Philippines.

For the reasons set forth herein, it is respectfully submitted that this Court should grant this Petition for Writ of Certiorari.

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Feliciano LEJANO and Melinda Lejano

v.

K.S. BANDAK, et al.

No. 97-CC-0388.

Supreme Court of Louisiana.

Dec. 12, 1997.

Richard J. Dodson, David C. Vidrine, Baton Rouge, John J. Molaison, Jr., Walter J. LeBlanc, Jr., Gretna, Arthur D. Dupre, Jr., Metairie, A.N. Yiannopoulos, New Orleans, Symeon C. Symeonidas, for Applicant.

David B. Lawton, Kevin J. LaVie, New Orleans, for Respondent.

JOHNSON, Justice.

We granted certiorari in this maritime tort case to determine the enforceability and validity of a forum selection provision of an employment contract between a Filipino seaman, and a Norwegian shipowner and employer. The cause of action arose in Florida, but a forum selection provision in the employment contract states that the claim may be brought in either the Philippines or Norway. Finding that the forum selection clause is enforceable, the trial court granted defendants' motion for partial summary judgment and ordered plaintiffs to file their claim in either the Philippines or Norway. The court of appeal affirmed the trial court's grant of defendants' motion for partial summary judgment and denied plaintiffs' writ application.

FACTS AND PROCEDURAL HISTORY

On November 7, 1991, plaintiff, Feliciano Lejano, a Filipino seaman, was working aboard the M/V BANDAK in the straits of Florida after sailing from Mobile, Alabama. Mr. Lejano was working on a suspended scaffold when a rope broke which had been holding the scaffold, resulting in his falling approximately thirty feet to the deck below. The parties agree that the accident occurred during the course and scope of Mr. Lejano's employment with defendant, K.S. Bandak, a Norwegian limited partnership owned by Borgestad, Inc., a Norwegian company. At the time of the accident, the M/V BANDAK was located in international waters, and was owned and operated by defendant, K.S. Bandak. Mr. Lejano suffered severe injuries as a result of the accident, including quadriplegia and brain damage. Mr. Lejano was hospitalized for a few months in a hospital in Miami, Florida. He was subsequently transferred to a hospital in the Republic of the Philippines in February, 1992, where he was hospitalized for an additional 10 months.

Seeking recovery under the Jones Act, General Maritime Law, and Federal Maritime Law, plaintiffs filed suit against K.S. Bandak and its foreign insurers, Assuranceforeningen Gard and Gard (U.K.), Ltd. in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana on September 16, 1993. Plaintiffs obtained quasi-in-rem jurisdiction by way of a non-resident writ of attachment on the M/V BANDAK in September, 1993, which was docked within the jurisdiction of the Twenty-Fourth Judicial District Court. Plaintiffs later filed an amended petition, naming as an additional defendant, K.S. Bandak II, the owner of the vessel at the

time it was attached.[1] Plaintiffs subsequently filed yet another amended petition naming AS Borgestad and AS Borgestad Shipping as defendants.[2]

After the attachment, defendants posted security for Mr. Lejano's claims in the amount of $8,750,000 and the vessel was released. Defendants then filed several declinatory exceptions[3] and a request for a dismissal based on forum non conveniens. Defendants argued that under the forum selection clause in Mr. Lejano's employment contract, he has no cause of action and no right of action. After a hearing on August 3, 1994, the trial court rendered judgment overruling defendants' declinatory exceptions. However, the trial court maintained defendants' peremptory exceptions of no cause of action and no right of action, dismissing plaintiffs' demands with prejudice. In its Reasons for Judgment, the trial court reasoned that there were no sufficient contacts with the United States to warrant application of its laws to this case. The trial court further reasoned that Mr. Lejano's employment contract, the revised standard employment

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[1] In July, 1993, the K.S. Bandak sold the M/V BANDAK to K.S. Bandak, II, a partnership also owned by Borgestad, Inc.

[2] The trial court determined that on the date of the accident, as well as on the date the vessel was attached, AS Borgestad, a Norwegian corporation, owned substantial shares in the vessel through its wholly- owned subsidiary, AS Borgestad Shipping, and that AS Borgestad was the sole shareowner of the named general partner in the two partnerships (KS Bandak and KS Bandak II).

[3] Declinatory exceptions were lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of citation, insufficiency of service of process and improper venue.

contract, and the collective bargaining agreement applicable to the employment relationship require that disputes be resolved in Norway or the Philippines. Additionally, the trial court ruled that the doctrine of forum non conveniens is applicable to this case, stating that plaintiffs' suit was dismissed on this basis.

The court of appeal reversed the trial court judgment and remanded the case to the trial court on March 1, 1995. The court of appeal reasoned that because plaintiffs' petition states claims under the Jones Act and General Maritime Law, that plaintiffs are afforded a remedy in law, and that plaintiffs are the people in whose favor the law extends the remedy, plaintiffs therefore have a right of action. The court of appeal further reasoned that pursuant to La. C.C.P. art. 123(C), the doctrine of forum non conveniens is inapplicable to this Jones Act case.

On remand, defendants moved for a partial summary judgment on the issue of choice-of-law, urging the application of Norwegian substantive law. Plaintiffs argued that the substantive provisions of Philippine law should be applied. On September 21, 1995, the trial court found that the forum selection clause in Mr. Lejano's contract was valid and that the case was governed by either Norwegian or Philippine law. Accordingly, the trial court ordered Mr. Lejano to file his claim in either Norway or the Philippines, indicating that should defendants attempt to frustrate his efforts to pursue the case in a foreign forum, it would proceed to adjudicate the claim applying Philippine or Norwegian law.

Plaintiffs filed a motion for new trial. In their motion for new trial, plaintiffs contended that the trial court was

in error and bound by the "law of the case" by virtue of the court of appeal's previous opinion. Plaintiffs further argued that Mr. Lejano's cause of action had prescribed in both Norway and the Philippines, and that therefore, the only viable forum in the entire world was the Twenty-Fourth Judicial District Court, where plaintiffs' action was pending. The trial court denied plaintiffs' motion for new trial on November 16, 1995. Plaintiffs sought appellate review of this ruling. After a different panel of the court of appeal denied plaintiffs' writ application on January 9, 1996, plaintiffs filed a writ application with this court. This court granted the writ and remanded the case to the court of appeal for briefing and the rendering of an opinion. On January 15, 1997, the court of appeal affirmed the decision of the trial court. *Lejano v. Bandak*, 95-1011 (La.App. 5 Cir. 1/15/97), 688 So.2d 86. Plaintiffs filed writs with this court, arguing that the court of appeal erred in affirming the trial court's dismissal of their action on the basis of the forum selection clause, and that by doing so, the court of appeal violated state and federal jurisprudence, the open access clause of Article I, Section 22 of the Louisiana Constitution, and the policy embodied in La. C.C.P. art. 123(C). In their writ application to this court, plaintiffs allege that the court of appeal erred in the following respects:

> 1. Enforcing a choice of forum clause in favor of a party who was not a signatory to the clause;
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> 2. Enforcing a clause against a party who was not in a position to negotiate the clause and who could not read the language in which the clause was written;

3. Arbitrarily extending the scope of the clause to delictual disputes in blatant disregard of the specific wording of the clause which clearly confined the scope of the clause to purely contractual disputes; and

4. Treating as being mandatory a clause that was clearly intended to be merely permissive.

BACKGROUND

A. Maritime Jurisdiction, Generally

Three provisions of the United States Constitution govern maritime law jurisdiction: (1) Article III, section 2 extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction"; (2) Article I, section 8 gives Congress the power to "make all laws which shall be necessary and proper for carrying into execution . . . all . . . powers vested by this constitution in the government of the United States, or in any department or officer thereof"; (3) the Supremacy Clause (Article VI, clause 2) makes that body of federal law binding on the states. *David W. Robertson, Admiralty and Maritime Litigation in State Court*, 55 La. L.Rev. 685, 687-688 (1995). The United States Supreme Court has held that the first two constitutional provisions above empower the federal courts and Congress to create and interpret a nationally uniform maritime law. Robertson, supra notes 8 and 9, at 687-688.

Article III of the United States Constitution, from the Constitutional Convention of 1787, marked a significant centralization of admiralty authority from Colonial days and from the period of the Articles of Confederation

during which maritime claims were adjudicated in the admiralty courts of each colony/state. *See generally*, Putnam, How the Federal Courts Were Given Their Admiralty Jurisdiction, 10 Cornell L.Q. 460 (1925). While Article III extended the judicial power of the United States to all admiralty and maritime cases, it did not create the lower federal courts or vest them with jurisdiction.

In 1789, the First Congress took the essential first step by creating federal district courts and giving them admiralty jurisdiction. *Robertson, supra* note 13, at 688.[4] By this statute, "the entire admiralty power of the Constitution was lodged in the Federal Courts." *The Belfast*, 74 U.S. (7 Wall.) 624, 638, 19 L.Ed. 266 (1869). The statutory grant of admiralty jurisdiction to the federal districts courts, in its present version, is codified as 28 U.S.C. § 1333, and provides in pertinent part:

> "The district courts . . . shall . . . have original jurisdiction, exclusive of the courts of the states of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Robertson, supra at 688.

There is admiralty jurisdiction in tort as well as contract cases. Perhaps the most important body of tort cases

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[4] The Judiciary Act of 1789, § 9, 1 Stat 73, 76-77 (1789) provides: "The district courts . . . shall . . . have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

falling within the admiralty jurisdiction are those involving injuries to seamen. *Robertson, supra* note 32, at 691.

28 U.S.C. § 1333 has been interpreted as making federal court admiralty jurisdiction exclusive as to actions in rem[5] against vessels or against other maritime property. *Robertson, supra* note 81, at 698. Most admiralty cases, however, are cases of concurrent jurisdiction rather than exclusive jurisdiction. *Robertson, supra* at 699. The plaintiff may bring the case in federal court on the basis of admiralty jurisdiction, or the plaintiff may take advantage of the "saving to suitors" clause, which has been interpreted as giving the plaintiff in most types of admiralty or maritime cases the option of bringing the suit in state court. *Robertson, supra* note 86, at 699. The "saving to suitors" clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine, which requires that the substantive remedies afforded by the states conform to governing federal maritime standards. *Offshore Logistics, Inc., et al. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); *Robertson, supra* note 91, at 700. When a maritime plaintiff takes

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[5] In note 81, the author points out that the importance of noting that state courts which say that they "have in rem jurisdiction" pursuant to seizures of vessels refer to in rem jurisdiction in "the broad sense" as opposed to the "strict" sense applicable to the maritime action in rem. The author notes that "the central characteristic of the maritime action in rem – in rem in the strict sense – is that 'a judicial sale in the proceeding conveys title good against the world.' " As the author indicates, state courts cannot do that.

advantage of the "saving to suitors" clause to bring his case in state court, as a matter of general principle the state court is obligated by the Constitution's Supremacy Clause to follow the applicable substantive federal maritime law. *Robertson, supra* note 87, at 699. On matters of procedure, however, the state court is generally free to follow the state's own rules. *Robertson, supra* note 88, at 699. The Supremacy Clause restraint on the state courts is often called the "reverse-Erie" doctrine. Supra. During the past several years, the number of admiralty or maritime cases brought in state courts has increased. *Robertson, supra* note 1, at 686.

B. In Rem and Quasi In Rem Jurisdiction

Plaintiffs with claims based on admiralty or maritime law sometimes encounter a problem when attempting to effect service of process on the prospective or intended defendant. In the maritime context, the shipowner, often in a foreign land, was usually not subject to the court's jurisdiction. Geoffrey A. Hoffman, The Sudden Demise of the "No Res, No Case" Rule in Rule B Maritime Attachment Proceedings: *Stevedoring Services of America v. Ancora Transport*, 20 Tul. Mar. L.R. note 15 at, 175, 176 (1995). "Quasi in rem" jurisdiction rectifies this scenario. Pursuant to quasi in rem, if a defendant cannot be served within the territory, the court derives its authority to adjudicate personal claims against the defendant through attachment of defendant's property located in the territory. *Hoffman, supra* note 23, at 176. Moreover, attachment of property to obtain quasi in rem jurisdiction is used to obtain personal jurisdiction of the defendant, and may be

unrelated to the underlying maritime claim. *Hoffman, supra* note 47, at 178.

In *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877), the United States Supreme Court first articulated the "territorial" principal underlying quasi in rem jurisdiction and stated that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Hoffman, supra* note 21, at 176. Quasi in rem jurisdiction is to be distinguished from in rem jurisdiction. In rem jurisdiction allows plaintiffs who are injured by a ship to seek redress directly against the ship. *See Hoffman, supra* note 16, at 176. Comparatively, with quasi in rem jurisdiction, recovery is limited to the value of the seized property, unless the defendant is personally served with process. *Hoffman, supra* note 29, at 177.

The development of land-based quasi in rem jurisdiction can be traced back to our nation's beginnings, to a time when it was extremely difficult to locate defendants and to prosecute claims in distant forums. *Kalo, supra* notes 47-48, at 32. During those early times, even when personal jurisdiction could be acquired, judgments rendered in one colony were not readily enforced in another. *Kalo, supra* note 49, at 32. In that historical setting, one practical solution to the difficulties facing a plaintiff was to allow him to seize property of the defendant located within the forum. *Kalo, supra* at 33. The seized property provided the basis for a limited form of jurisdiction over the defendant – quasi in rem – and furnished a source from which any judgment could be satisfied. *Kalo, supra* note 50, at 33. This form of jurisdiction continued to be necessary after the Constitution was adopted and the nation came into existence. *Kalo, supra* at 33. The strict

notions of territoriality that existed throughout the nineteenth century, coupled with problems related to communication and transportation, continued to make it difficult for many plaintiffs with valid claims to acquire personal jurisdiction over defendants. *Kalo, supra* note 53, at 33.

Admiralty, however, still has a legitimate need for limited forms of jurisdiction such as in rem and quasi in rem. The admiralty court's primary concern is maritime commerce, which is conducted on both a national and international scale. Those involved in maritime activities are often thinly financed, on narrow margins, highly mobile, and potentially difficult and expensive to locate. Moreover, even if personal jurisdiction can be asserted, when the defendant is a foreign national the judgment may not be enforceable at the place where the defendant's assets are located. Thus, in cases involving foreign parties, an inability to assert in rem and quasi in rem jurisdiction may mean the effective loss of the claim. Furthermore, regarding in rem actions, if the vessel is not seized as soon as possible, the lien claimant's priority may be lost by the creation of a subsequent maritime lien as the vessel moves from port to port. Permitting the quasi in rem action also provides additional assurance to local suppliers and others providing services on credit to transient vessels that they may be able to enforce their claims locally. Such assurances can only operate to the overall benefit of maritime commerce. While it is true that not all of these considerations apply to domestic maritime commerce or our own citizens, the need for such jurisdictional bases when dealing with foreign nationals is not diminished. *Kalo, supra* at 34-35.

C. Forum Selection Clauses

Consensual adjudicatory procedure denotes the ability of potential or prospective litigants to choose, in advance of any litigation, the court that will hear the dispute and the law that will govern the substantive merits of the litigation. Linda S. Mullenix, Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court, 57 Fordham L.Rev. 291, 296, note 10 (1988). It is essentially a doctrine of procedural choices by consent of the parties. These choices and this consent are typically manifested in "forum-selection clauses" and "choice-of-law" clauses contained in an agreement between the parties. *Mullenix, supra* note 11, at 296. Although these agreements affect basic procedural rights, their interpretation is nonetheless inevitably based in contract law.

Sometimes, the issues surrounding a forum selection clause are further complicated by the presence of an accompanying choice-of-law provision. However, when confronted with a combined forum selection clause and choice-of-law provision, most courts construe the forum selection clause without reference to the choice-of-law provision. *Mullenix, supra* note 294, at 347. The construction of forum selection clauses by a non-selected forum implicates full faith and credit issues, including subsequent collateral attack. *Mullenix, supra* note 337, at 354. It follows from the established characterization of the choice-of-law issue as federal substantive law that the validity and interpretation of choice-of-law clauses in maritime contracts is also a matter of federal law. *Robertson, supra* note 261, at 729. On the other hand, the validity and interpretation of forum selection clauses may

well be regarded as a procedural matter that is entirely controlled by state law. *Robertson, supra* note 262, at 729. The distinction between the two types of clauses has a useful analogy in the jurisprudence holding that while parties to a dispute generally cannot confer or withhold judicial jurisdiction by contract or stipulation, they can choose the substantive law that governs their dispute. *Robertson, supra* note 264, at 730.

There are conflicting decisions by courts in this state as to whether or not a case can be conditionally dismissed by virtue of a forum selection clause in a seaman's contract of employment. The Fourth Circuit Court of Appeal allowed dismissal in *Barcelona v. Sea Victory Maritime, Inc.*[6] and *Prado v. Sloman Neptun Schiffahrts, A.G.*[7] as did the Fifth Circuit Court of Appeal in the instant case. *See Lejano v. Bandak*, 688 So.2d at 86. However, the Fifth Circuit subsequently refused to enforce a forum selection clause in a seaman's contract in *Madrid v. Polembros Maritime Co., Ltd.*, 95-0545 (La.App. 5 Cir.1995), 660 So.2d 955.

LAW AND ANALYSIS

Plaintiffs argue that the dismissal or transfer of their case from the Twenty-Fourth Judicial District Court to either the Philippines or Norway on the basis of the forum selection clause is, in fact, a disguised dismissal on the basis of forum non conveniens, which was expressly

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[6] 619 So.2d 741 (La.App. 4th Cir.1993), *writ denied*, 626 So.2d 1179 (La.1993).

[7] 611 So.2d 691 (La.App. 4th Cir.1992), *writ not considered*, 613 So.2d 986 (La.1993).

prohibited by this court in *Miller v. American Dredging*, 595 So.2d 615 (La.1992), *aff'd* 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994). Forum non conveniens is a doctrine by which a court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Miller*, 595 So.2d at 616. Louisiana courts may not dismiss cases for forum non conveniens except as provided in La. C.C.P. art. 123. *Miller v. American Dredging*, 595 So.2d at 617. In Louisiana, the doctrine of forum non conveniens is specifically made unavailable in a Jones Act or maritime law case. La. C.C.P. art. 123; *Miller*, 595 So.2d at 617. A clear reading of article 123(C) supports this conclusion. La. C.C.P. art. 123(C) provides:

> "The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C. § 688 or federal maritime law." La. C.C.P. art. 123(C).

Louisiana courts have refused to apply forum non conveniens to maritime or admiralty cases irrespective of the fact that the common law doctrine has been recognized in federal admiralty law since at least 1801. *See Miller*, 595 So.2d at 616. Because Louisiana has no doctrine of forum non conveniens in maritime cases, a maritime action may be maintained as long as venue is proper and jurisdiction is obtained over the defendant, either in personam or by quasi in rem attachment of its property. *Russell v. CSX Transportation*, 96-2151, 96-2362 (La.2/25/97), 689 So.2d 1354. The "saving to suitors" clause allows litigants to bring in personam maritime actions in state courts. *Offshore Logistics v. Tallentire*, 477 U.S. 207, 222, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986). A suit to recover damages under the Jones Act is in

personam against the ship's owner and not in rem against the ship itself. *Lauritzen v. Larsen*, 345 U.S. 571, 574, 73 S.Ct. 921, 924, 97 L.Ed. 1254 (1953).

In the instant case, the Twenty-Fourth Judicial District Court obtained quasi in rem jurisdiction over the defendants through the non-resident writ of attachment of the M/V BANDAK. It is well-settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Miller*, 595 So.2d at 617, *citing Offshore Logistics*, 477 U.S. at 207, 106 S.Ct. at 2486; *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924). That proviso is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917). The United States Supreme Court held that the doctrine of forum non conveniens is neither a "characteristic feature" of admiralty nor a doctrine whose uniform application is necessary to maintain the "proper harmony" of maritime law. *American Dredging*, 510 U.S. at 447, 114 S.Ct. at 985. Thus, it is within the authority of Louisiana courts to decline application of forum non conveniens to maritime cases. Prior to addressing plaintiffs' argument that the transfer of the case is a disguised dismissal on the basis of forum non conveniens, the court must determine whether the forum selection clause is valid and whether the lower courts correctly ruled to

enforce the provisions thereof. If the forum selection clause is valid and enforceable, a transfer to either the Philippine [sic] or Norway cannot be found to be a disguised transfer on the basis of forum non conveniens.

Although the instant case is within the federal admiralty jurisdiction, it is brought in state court pursuant to the "saving to suitors" clause. Consequently, the state court has concurrent jurisdiction and is "free to adopt such remedies and to attach them to such incidents as it sees fit so long as it does not attempt to make changes in substantive maritime law." *Offshore Logistics*, 477 U.S. at 221, 106 S.Ct. at 2494. As earlier stated, generally, state courts are free to follow the state's own procedural rules. *Robertson, supra* note 87, at 699. Generally, questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive in nature. *Jones v. Weibrecht*, 901 F.2d 17, 19 (2nd Cir.1990), *citing Stewart*, 487 U.S. at 32, 108 S.Ct. at 2245; *Manetti-Farrow, Inc., v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir.1988). Because the validity and interpretation of forum selection clauses are regarded as procedural, they are generally controlled by state law. *See Robertson supra* note 262, at 729. However, the United States Supreme Court has determined that in admiralty cases, federal law governs the enforceability of forum selection clauses.[8] *Carnival*

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[8] *Compare Stewart Organization, Inc. v. Ricoh Corporation*, 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) [held that federal law governs the decision whether to grant a motion to transfer pursuant to 28 U.S.C. § 1404(a) to a venue provided in the forum selection clause, thereby recognizing another exception to the general rule that state law governs matters of procedure].

Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

Although Mr. Lejano's underlying claims are based on tort law under the Jones Act and federal maritime law, the contested forum selection clause is contained in his employment contract. A contract for hire of a ship or of the officers and sailors to man her falls within admiralty jurisdiction. *Kossick v. United Fruit Co.* 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961). Mr. Lejano's employment contract with K.S. Bandak to work aboard the M/V BANDAK falls within admiralty jurisdiction. Because the employment contract falls within admiralty jurisdiction, the Supremacy Clause mandates that the body of law governing maritime law is binding on the states. *See* Const. Art. VI, clause 2.

Generally, where maritime contracts are involved, the federal interest is at its "zenith" while in maritime tort cases, the interest in uniformity is minimal because of the fortuitous nature of accidental injuries and the strong interest in providing redress for injuries. *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.1992), *citing Rodrigue v. Legros*, 563 So.2d 248 (La.1990). Therefore, we find that the courts of this state sitting in admiralty should examine the validity and enforceability of forum selection clauses in accordance with federal law and standards.

Forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). *See also, Mullenix, supra*

note 50, at 307. A forum selection clause should control absent a strong showing that it should be set aside. *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916. A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916.

In *The Bremen*, the United States Supreme Court examined the enforceability of a forum selection clause in a contract entered into by two business corporations: Zapata, an American corporation, and Unterweser, a German corporation. The contract provided that Unterweser was to tow Zapata's ocean-going drilling rig from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea. The contract contained a forum selection clause, which provided that any dispute arising under the contract was to be resolved in the London Court of Justice. After a severe storm damaged the rig in the middle of the Gulf of Mexico, Zapata instructed the Bremen to tow its damaged rig to Tampa, Florida, the nearest port of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal court in Tampa. Unterweser moved to dismiss on the basis of the forum selection clause. The District Court denied Unterweser's motion, and the Court of Appeals affirmed. Finding that a freely-negotiated private international agreement unaffected by fraud, undue influence, or overweening bargaining power should be given full effect, the United States Supreme Court vacated and remanded. *The Bremen*, 407 U.S. at 13, 92 S.Ct. at 1915. The Court spoke favorably of, and upheld the forum selection clause, despite its recognition that historically, forum selection

clauses were generally disfavored. *The Bremen*, 407 U.S. at 9, 92 S.Ct. at 1912-13. Moreover, in The Bremen, the Court considered that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916. Hence, according to The Bremen, a forum selection clause should be enforced absent a clear showing that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud or overreaching. *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916.

The forum selection clause in the present case is contained in a collective bargaining agreement between the union and the seaman. The parties to the collective bargaining agreement are The Associated Marine Officers' and Seaman's Union of the Philippines ("AMOSUP") and The Norwegian Shipping and Offshore Federation ("ASO"). The collective bargaining agreement provides that "this agreement shall be binding with regard to Filipino seafarers serving on board a vessel where these terms have been applied. . . . " The collective bargaining agreement further states in part:

> "This agreement is an agreement for Filipino seafarers serving on vessels registered in the Norwegian International Ship Register. . . . "

The collective bargaining agreement provides that suit may be brought in either Norway or the Philippines. Article 15 of the agreement provides:

"Jurisdiction

> The Unions and the ASO have observed that according to the NIS ACT this agreement should be subjected to Norwegian law and the jurisdiction of the courts in Norway. Cases concerning the seafarer's service on the ship may be brought against the Company before a Norwegian Court or before a Court in the seafarer's country of residence."[9]

The evidence reveals that Mr. Lejano is a member of the collective bargaining unit represented by AMOSUP, while defendant/shipowner is a member of the collective bargaining unit represented by ASO. The forum selection clause is the result of negotiations between the Philippine Seamen's union and the Norwegian government.

The forum selection provision of the employment contract between Mr. Lejano and defendant repeats the language of the forum selection provision in the collective bargaining agreement. The employment contract also specifically states that a claim arising from the contract is to be brought in either Norway or the Philippines, subject to application of Norwegian's law. The "Contract of Employment" provides in pertinent:

> "This agreement is subject to Norwegian law and Jurisdiction. Dispute with shipping company in connection with the employees service on board the ship may be brought either before a Norwegian court or a court in the country of the seaman's domicile."

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[9] "NIS": (The Norwegian International Ship Register Act).

Mr. Lejano signed the employment contract on the same page where the forum selection clause is contained. Mr. Lejano maintains however, that the employment contract is written in English, a language he does not understand – not in his native language, Tagalog. Mr. Lejano contends that for this reason, he had no power to negotiate any of the terms of the agreement and that the clause should be invalid.

The employment contract was approved by the Philippine Overseas Employment Administration (hereinafter, "POEA") and signed in the Philippines. The POEA is a Philippine government agency charged with overseeing the employment of Filipinos, including seamen, by foreign entities. *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741, 744 n. 2 (La.App. 4th Cir.1993), *writ denied*, 626 So.2d 1179 (La.1993). The Philippine government established the POEA to promote and develop overseas employment opportunities and to afford protection to Philippine workers and their families. *Prado*, 611 So.2d at 702, *citing Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 221 (3rd Cir.1991). "The POEA has promulgated extensive rules and regulations controlling overseas employment to accomplish these objectives. It registers seamen seeking jobs, prescribes standard employment contracts for them, approves their wages, and requires that 80% of their earnings be sent home. The POEA regulates advertisement and placement, contract processing and travel documentation, the filing of grievances, and provides worker assistance and Welfare services." *Prado*, 611 So.2d at 702. Under Philippine law, no foreign employer may hire Philippine workers for overseas employment except through the POEA. *Prado*, 611 So.2d at 702.

The employment contract in the instant case was not only bargained for and approved by the POEA, but it was in the standard form prepared and used by the POEA. The employment contract heading reads:

> "Department of Labor and Employment PHILIPPINE OVERSEAS EMPLOYMENT ADMINISTRATION CONTRACT OF EMPLOYMENT"

Parties to a contract may agree in advance to submit to the jurisdiction of a given court. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). The employment contract was written in the language used by Mr. Lejano's own government in the interests of its own citizens, including the choice-of-law and forum selection clauses. *See Prado*, 611 So.2d at 703. The forum selection clause was conspicuously written on one page of the two-paged contract. Mr. Lejano signed the contract on both pages. Mr. Lejano's claim that he did not understand the language in which it was written is of no consequence in light of the Philippine employment services' structure, the fact that the POEA acted on his behalf in negotiating and bargaining for the terms of the contract, and the fact that Mr. Lejano signed the POEA-approved contract, thereby submitting to the terms thereof, and consequently, being afforded any benefits and advantages of other provisions of the contract. "When parties reduce their contracts to writing, and when the terms of the writing exhibit no uncertainty or ambiguity as to the nature, the object, and the extent of the agreement, it is presumed that the writing expresses the true and complete undertakings of the parties." *Standard Oil Co. of Louisiana v. Futral*, 204 La. 215, 15 So.2d 65,

75 (1943), *citing Rodgers v. S.H. Bolinger Co.* 149 La. 545, 89 So. 688, 690 (1921).

Pursuant to the terms of the forum selection provisions of the collective bargaining agreement and the employment contract, Mr. Lejano has the option of bringing his cause of action in either Norway or the Philippines, the place of his own domicile. It is Mr. Lejano's contention that the applicable substantive laws are the laws of the Philippines. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. *Lauritzen v. Larsen*, 345 U.S. 571, 588, 73 S.Ct. 921, 931, 97 L.Ed. 1254 (1953). Certainly, the employment contract drafted and approved by the Philippine government, particularly the POEA, would be enforceable under the laws of that country. This court is not inclined to extract the forum selection provision of the employment contract, which would otherwise be enforceable under Philippine law, and render the clause unenforceable when the clause prevails under the standards promulgated by the Court in The Bremen. Under these circumstances, this court finds that the forum selection provision of the employment contract is not adhesive, neither is it affected by fraud, undue influence, or overweening bargaining power. Moreover, Mr. Lejano has failed to make a clear showing that enforcement would be unreasonable, unjust, fraudulent or overreaching. Following the standards of The Bremen, we hold that the forum selection provision of the employment contract is enforceable. Accordingly, we further find that the trial court's ruling that plaintiffs must file their claims in either the Philippines or Norway is not a disguised transfer on the basis of forum non

conveniens. Because we find that the forum selection clause contained in the employment contract is enforceable, we decline to make a determination of the applicable substantive law by analyzing the case pursuant to the Lauritzen-Rhoditis choice-of-law test.[10]

Plaintiffs also argue that the language of the forum selection clause in the employment contract is permissive, not mandatory. Specifically, the provision states that the suit "may" be brought in either Norway or the Philippines. Plaintiffs contend that because "may" is used in lieu of "shall", they are not limited to either of these fora. An examination of the parties' intention is dispositive of this issue. Although the provision states that the seaman "may" bring his claims in either the Philippines or Norway, it is highly improbable that the parties would take measures of specifying these two fora, only to mean that the seaman may actually bring his claim in any forum as he otherwise could absent such a provision. Such a result would render the forum selection clause of the employment contract absolutely meaningless and useless. For

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[10] In *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), the United States Supreme Court delineated seven factors which influence the choice-of-law to govern a maritime tort claim and the weight and significance accorded them. The factors are

> (1) place of wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the seamen; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum.

The Court in *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) expanded the list to include the shipowner's base of operations as an additional factor.

this reason, we reject this argument. Moreover, enforcing the forum selection clause under these facts gives effect to the parties' legitimate expectations. *See The Bremen*, 407 U.S. at 12, 92 S.Ct. at 1914.

Mr. Lejano further argues that during the pendency of his case in the courts of this state, his claims have prescribed in both Norway and the Philippines, and that consequently, he will be deprived of his day in court should this court require him to file in either of these fora. In *The Bremen*, the Court stated " . . . [I]t should be incumbent on the party seeking to escape his contract to show that the trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *The Bremen*, 407 U.S. at 16, 92 S.Ct. at 1916. In the present case, defendants have agreed to waive the defense of prescription. Defendants testified at the hearing before the trial court, as well as during oral argument before this court, that they will concede that prescription has been interrupted.[11] Furthermore, the trial court has assured protection of Mr. Lejano's "day in court" by staying the matter for six months, during which time Mr. Lejano is to file suit in either Norway or the Philippines. The trial court also stated in its Judgment that "if the plaintiffs can show that the defendants are attempting to frustrate their efforts to pursue this claim in a foreign forum, this Court will proceed to adjudicate this claim applying Philippine or Norwegian law." Therefore, Mr.

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[11] *See* trial transcript, p. 4. November 7, 1995.

Lejano does have safeguards against the loss of his day in court based on any claims of prescription. Moreover, Mr. Lejano has made no showing that it would be unfair, unjust or unreasonable to hold him to his end of the bargain.

Louisiana courts have previously enforced forum selection clauses. *See Prado*, 611 So.2d at 691. *See also, Barcelona*, 619 So.2d at 741. In *Prado*, a Filipino seaman brought a maritime tort action against the owner of a vessel on which he was injured. He had signed an employment contract which contained a choice-of-law provision, specifying application of Philippine law. The seaman was also hired through the POEA. The court enforced the provisions of the forum selection clause. The court reasoned that the seaman's employment contract was in a form and used the language required by his own government in the interests of its own citizens, including the choice-of-law and forum selection clauses. The court found that there can be no basis for Prado to complain that Asiento, the defendant, took advantage of him in negotiating the language of the contract, and further, that Prado cannot complain that the Philippines is a "remote alien forum". *See The Bremen*, 407 U.S. at 1, 92 S.Ct. at 1909. The court stated, "we cannot be persuaded that whatever forum Prado's claim would be referred to in the Philippines would be less favorably inclined towards him than towards an non-resident alien entity such as Asiento. When the Bremen court used the terms "unjust and unreasonable" it was not referring to Prado's desire to choose the forum of maximum recovery." *Prado*, 611 So.2d at 703. Moreover, the Prado court found that The Bremen standard had not been satisfied, for Prado had

not accused Asiento of fraud or overreaching – neither was there anything to suggest that the agreement was an adhesive one. *See Prado*, 611 So.2d at 703. *See also, The Bremen*, 407 U.S. at 16, 92 S.Ct. at 1916. Ultimately, the court ordered that the proceedings be stayed for six months, during which time Prado was to furnish the trial court with satisfactory proof that he has complied with the court's order to file his claim in a forum in the Philippines. It was further ordered that in the event Prado should produce satisfactory proof to the trial court that Asiento has attempted to frustrate his efforts to pursue this claim in a Philippine forum by raising objections based upon the filing of this claim by Prado first in the U.S., the court would hear the case.

In *Barcelona*, the forum selection provision was identical to the one in the instant case. *See Lejano*, 688 So.2d at 90. The court enforced the provisions thereof in Barcelona as well. In *Barcelona*, twelve seamen and the parents of one seaman who was killed in the course and scope of his employment, brought action against the M/V SEA VICTORY, for the alleged breach of a maritime employment contract. The deceased seaman's parents alleged wrongful death, and the sources for their damage claims include the Jones Act and general maritime law. The court of appeal addressed the issue of the enforceability of the forum selection provision of the contract, which required that litigation between the parties be conducted in the Philippines. The trial court found in favor of the defendants and granted defendants motion for summary judgment. The court of appeal affirmed. The court of

appeal reasoned that Louisiana has no interest in resolving disputes between Philippine citizens and foreign corporations arising from contracts drafted, regulated, and approved by the Philippine Overseas Employment Administration, and signed in the Philippines. The court of appeal noted that the Philippines has a substantial public interest in providing these seamen with a fair hearing and just resolution of their claims.

Plaintiffs in the present case allege that the court of appeal erred in failing to follow the "law of the case" established by an earlier decision of another panel of the same court which was rendered on March 1, 1995 in this case. The "law of the case" principle embodies the rule that an appellate court will not reconsider its own rulings of law in the same case. However, the doctrine is discretionary and is not applicable in cases of palpable error or when, if the law of the case were applied, manifest injustice would occur. *Vincent v. Ray Brandt Dodge,* 94-291 (La.App. 5 Cir. 3/1/95), 652 So.2d 84, 85, *writ denied* 95-1247 (La.6/30/95), 657 So.2d 1034, *citing Landry v. Aetna Ins. Co.*, 442 So.2d 440 (La.1983). In its March 1, 1995 decision, the court of appeal found that because plaintiffs stated claims under the Jones Act and general maritime law, plaintiffs had a cause of action, and further, that plaintiffs indeed had a right of action because plaintiffs were the injured parties. However, in its subsequent opinion on January 9, 1996, the court of appeal's decision addressed the trial court's disposition of defendants' motion for partial summary judgment, which was based on the forum selection clause in the employment contract

between Mr. Lejano and defendant. In the earlier decision, the court of appeal did not address the forum selection clause. Because the issues in the court of appeal's March 1, 1995 decision and the January 9, 1996 decision were different, the court of appeal did not violate the "law of the case" principle.

Plaintiffs further allege that Act 943 of the 1997 Legislature invalidates the forum selection clause. The Louisiana Legislature recently enacted Act 943, which amended Louisiana Revised Statute 51:1407. Act 943 provides in pertinent part:

> " . . . It being against the public policy of the State of Louisiana to allow a contractual selection of venue or jurisdiction contrary to the provision of the Louisiana Code of Civil Procedure, no provision of any contract which purports to waive these provisions of venue, or to waive or select venue or jurisdiction in advance of the filing of a civil action, may be enforced against any plaintiff in any action brought in these courts. . . . "

La. R.S. 51:1407 is entitled "Unfair Trade Practices and Consumer Protection Law". Act 943 was clearly not intended to apply to forum selection clauses in maritime law cases – application of Act 943 is to "provide for venue to sue professional solicitors; to expand the definition of 'professional solicitor'; to provide for violations and penalties; and to provide for related matters." H.R. 395, 23rd Reg. Sess. (La.1997). Act 943 is limited in scope to transactions or interactions between out-of-state, professional

telephone solicitors and Louisiana residents;[12] therefore, it does not forbid forum selection clauses as against public policy as they relate to maritime law causes of action. Accordingly, we find that Act 943 is inapplicable to the facts of this case.

A motion for summary judgment is proper when the pleadings, depositions, answers and omissions on file, together with the affidavits submitted, show that there is no genuine issue of material fact, so that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966; *Bijou v. Alton Ochsner Medical Foundation*, 95-3074 (La.9/15/96), 679 So.2d 893. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except as disallowed by law. *See* La. C.C.P. art. 966(B). When analyzing the forum selection clause in the instant case in light of the record and under the appropriate federal standards, particularly, the standard promulgated in The Bremen, there is no

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[12] During the committee meeting, the following was stated: Barbara Ballard: "This section or this chapter in the revised statutes only addresses professional solicitations for charitable organizations. So unless they're asking for money for a charity, it has nothing to do with those calls . . . "

Senator Fields: "I just want to offer up the amendment. . . . It deals with Louisiana residents if you got a[n] out of state entity or corporation or solicitor, if you will, and that Louisiana resident, something happens and a lawsuit if filed then a Louisiana resident does not have to go to Texas or to – to wherever the corporation is. They can file suit in their own resident state in their jurisdiction as opposed to making our citizens go out to Texas or to Milwaukee or wherever the case may be." Louisiana State Senate, Commerce and Consumer Protection Committee, June 4, 1997. (Discussion of Bill # 395).

genuine issue of material fact as to the enforceability of the forum selection clause. Although our courts have concurrent jurisdiction over plaintiffs' maritime action, as the United States Supreme Court noted, "jurisdiction in maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable." *Lauritzen v. Larsen*, 345 U.S. at 591, 73 S.Ct. at 932. Moreover, resolving this issue by way of a motion for partial summary judgment promotes judicial economy, averts the accrual of unnecessary costs by the parties and curtails any further delay in the parties' proceeding for trial on the merits. Thus, the trial court did not abuse its discretion in granting defendant's motion for partial summary judgment.

DECREE

For the foregoing reasons, we hold that the forum selection clause is enforceable. Accordingly, we affirm the judgment of the trial court, as affirmed by the court of appeal, granting defendants' partial motion for summary judgment.

AFFIRMED.

KIMBALL, J., concurs in part and dissents in part.

VICTORY, J., concurs in part and dissents in part for the reasons assigned by KIMBALL, J.

KNOLL, J., not on panel. Rule IV, Part 2, § 3.

KIMBALL, Justice, concurring in part and dissenting in part.

I concur in that portion of the majority opinion which holds the forum selection clause is enforceable. I dissent, however, from that portion of the opinion which implies that a Louisiana court can adjudicate plaintiff's claims should he be unsuccessful in his suit filed either in Norway or the Philippines. Either the forum selection clause is valid or it isn't. Although the grave difficulty or inconvenience of having a trial in the jurisdiction provided for in the forum selection clause is a valid consideration when determining whether the clause is valid, that the claim may ultimately be unsuccessful there is not.

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 454-127 DIVISION "D"

FELICIANO LEJANO AND MELINDA LEJANO

VS.

K. S. BANDAK ASSURANCEFORENINGEN GARD, AND

K. S. BANDAK, II

JUDGMENT ON EXCEPTIONS OF K/S BANDAK AND K/S BANDAK II

(Filed Aug. 3, 1994)

This matter came before the Court on the 10th day of May, 1994.

PRESENT: RICHARD J. DODSON

ARTHUR DUPRE

Attorney for Plaintiffs;

DAVID B. LAWTON

Attorney for Defendants.

The exceptions were argued, submitted and taken under advisement.

After considering the record and applicable law, and for written reasons this day assigned, the Court rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Declinatory Exceptions filed herein by the defendants, KS Bandak and KS Bandak II, be and the same are hereby overruled; further,

IT IS ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Cause of Action and No Right of Action filed herein by the defendants, KS Bandak and KS Bandak II, be and the same are hereby maintained and plaintiffs demands against the defendants are hereby dismissed with prejudice; further,

IT IS ORDERED, ADJUDGED AND DECREED that the doctrine of *forum non conviens* [sic] is applicable to this case and plaintiffs suit is dismissed on this basis.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana this 3rd day of Aug., 1994.

/s/ Walter B. Kollin
JUDGE

FELICIANO LEJANO *ET AL.*, *Plaintiffs*

v.

K.S. *BANDAK, ET AL., Defendants*
Louisiana, Twenty-Fourth Judicial District Court,
Parish of Jefferson, August 3, 1994
No. 454-127

Richard J. Dodson (Dodson & Vidrine) *for Plaintiffs*

David B. Lawton (Terriberry, Carroll & Yancey, L.L.P.) *for Defendants*

Walter B. Kollin, J.:

Feliciano Lejano, a Philippine seaman, was injured on November 7, 1991 while serving aboard the M/V *Bandak*. At the time of the injury, the vessel was on the high seas approximately 230 miles off the coast of Florida. Mr. Lejano was transferred by U.S. Coast Guard helicopter to a hospital in Miami where he remained for almost three months. Mr. Lejano was then transferred to the Philippines.

Plaintiffs have filed suit against KS Bandak, a Norwegian limited partnership that owned the vessel at the time of his injury. They have added as a defendant KS Bandak II, the owner of the vessel at the time she was attached by a writ of non-resident attachment while she was in the port of New Orleans on September 17, 1993.

Both defendants have filed numerous exceptions. KS Bandak II does not contest jurisdiction. The plaintiffs perfected jurisdiction over KS Bandak II when the vessel

was attached. However, KS Bandak contends it is not amenable to the jurisdiction of this Court. After extensively reviewing the memoranda and all of the exhibits filed by the parties, the Court finds that KS Bandak and KS Bandak II are one and the same. On both the date of the accident and the date the vessel was attached, AS Borgestad, a Norwegian corporation, owned substantial shares in the said vessel through its subsidiary, AS Borgestad Shipping. At all times, AS Borgestad Shipping has been a wholly-owned subsidiary of AS Borgestad. AS Borgestad was, in addition, the sole shareowner of the named general partner in the two partnerships. The personnel of AS Borgestad who were in charge of the management and control of the vessel were at both times the same, and the insurance coverage provided by Assuranceforeningen Gard, was the same. The Court finds by virtue of the attachment of the vessel, MV *Bandak*, this Court has jurisdiction over both defendants. Additionally, this Court finds KS Bandak II may be held liable for the obligation of KS Bandak as there was a transfer of a complete business activity. Accordingly, there is a cause of action against KS Bandak II.

Defendants additionally contend plaintiffs' suit should be dismissed because the demands are governed by Norwegian or Philippine law and these forums have exclusive jurisdiction. In *Prado v. Sloman Neptun Schiffahrts, A.G.*, 1993 AMC 1395, 611 So.2d 691 (La.App. 4 Cir. 1992) the Court cited as authority for a choice of law determination the considerations set forth in *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953) and *Hellenic Lines, Limited v. Rhoditis*, 398 U.S. 306, 1970 AMC 994

(1970). These two cases set forth eight factors to be considered in determining whether U.S. law is applicable to a maritime tort. These factors are: (1) place of wrongful act (here, international waters); (2) law of the flag (Norway); (3) allegiance or domicile of the injured party (The Republic of the Philippines); (4) allegiance of the shipowner (Norway); (5) place of the contract (The Republic of the Philippines); (6) accessibility of foreign forum (Norway or the Philippines); (7) law of the forum and (8) the vessel owner's base of operations (Norway). Applying these factors to the case at bar, the Court finds there are not sufficient contacts with the United States to warrant application of U.S. law to this case. Consequently, under the applicable law (either Norwegian or Philippine), plaintiffs have no cause of action or right of action in this Court. Additionally, Mr. Lejano's employment contract, the revised standard employment contract, and the collective bargaining agreement applicable to the employment relationship require that disputes be resolved in Norway or the Philippines. *Prado supra; Barcelona v. Sea Victory Maritime, Inc.*, 1994 AMC 445, 619 So.2d 741 (LA.App. 4th Cir. 1993).

Defendants also contend the doctrine of *forum non conveniens* is applicable to this case. This Court agrees. In *American Dredging Company v. Miller*, 510 U.S. ___, 1994 AMC 913 (1994), the Supreme Court held that Article 123(C) of the Louisiana Code of Civil Procedure, which renders that doctrine of *forum non conveniens* unavailable in Jones Act and maritime law cases brought in Louisiana state courts, is not pre-empted by federal maritime law. However, the Court limited its holding to cases involving domestic entities. As Justice Kennedy and Justice Thomas

state in their dissent, there may be a different result if those who raise the *forum non conveniens* objection are of foreign nationality. This court finds that Louisiana has no material interest in this cause of action and the plaintiffs should pursue their claims in the proper forum, either Norway or the Philippines.

FELICIANO LEJANO *ET AL.*, *Appellants*

v

K.S. BANDAK, *ET AL.*, *Appellees*

State of Louisiana, Court of Appeal, Fifth Circuit, March 1, 1995

No. 94-CA-783

Before: Dufresne, Gothard and Cannella, JJ.

Richard J. Dodson and David C. Vidrine (Dodson & Vidrine) and Arthur D. Dupre, Jr. (Halpern & Daigle) *for Appellants*

David B. Lawton (Terriberry, Carroll & Yancey) *for Appellees*

Appeal from the 24th Judicial District Court, Parish of Jefferson, State of Louisiana, Walter E. Kollin, J., 1994 AMC 2962. Reversed.

Sol Gothard, J.:

This is an appeal of a trial court judgment which dismissed the suit based on exceptions of no cause of action and no right of action, as well as the doctrine of *forum non conveniens*. 1994 AMC 2962. For the following reasons, we reverse and remand.

Facts

On November 7, 1991, plaintiff, Feliciano Lejano, a Philippine seaman, while employed by defendant, K.S. Bandak, a Norwegian limited partnership, and working

aboard the M/V *Bandak* (which was owned and operated by defendant and located in international waters off the coast of Florida), fell from scaffolding a distance of approximately thirty feet to the deck below, suffering severe injuries. Plaintiff spent the next few months in a hospital in Miami, Florida, and was transferred to a hospital in his homeland, the Republic of the Philipines, in early February, 1992.

On September 16, 1993, plaintiffs filed suit in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, against K.S. Bandak and its foreign insurers, Assuranceforeningen Gard and Gard (U.K.) Ltd. That same day, plaintiffs obtained a non-resident writ of attachment on the *Bandak*, which was then docked within the jurisdiction of the court. Plaintiffs thereafter amended their petition to include K.S. Bandak II, the owner of the vessel at the time she was attached, as a defendant in this matter.[1]

Defendants filed several exceptions as well as a request for a dismissal based on the doctrine of *forum non conveniens*. On August 3, 1994, after receiving memoranda and hearing oral arguments on the exceptions, the trial

---

[1] Plaintiffs later amended their petition to include AS Borgestad and AS Borgestad Shipping as defendants. While the issue is not before us, the trial court found that on both the date of the accident and the date the vessel was attached, AS Borgestad, a Norwegian corporation, owned substantial shares in the said vessel through its wholly-owned subsidiary, AS Borgestad Shipping, and that AS Borgestad was the sole shareowner of the named general partner in the two partnerships (KS Bandak and KS Bandak II).

court rendered judgment, overruling defendants' declinatory exceptions,[2] but maintaining defendants' peremptory exceptions of no cause of action and no right of action and dismissing plaintiffs' demands with prejudice. The trial court further held that the doctrine of *forum non conveniens* "is applicable to this case and the plaintiffs suit is dismissed on this basis."

Plaintiffs thereafter brought this appeal, assigning as errors: the trial court erred in maintaining defendants' peremptory exceptions of no cause of action and no right of action and dismissing plaintiffs' petition with prejudice; and the trial court erred in dismissing plaintiffs' claims on the basis of forum non conveniens and/or based upon a "forum selection clause." Defendants answered the appeal, requesting that defendants declinatory exceptions (which were overruled by the trial court) be granted on appeal. Because defendants failed to brief these alleged errors, pursuant to Uniform Rules – Courts of Appeal 2-12.4, we consider any argument on these alleged errors abandoned.[3]

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[2] Defendant's declinatory exceptions included: lack of personal jurisdiction, insufficiency of citation, insufficiency of service of process, improper venue, and lack of subject matter jurisdiction.

[3] See also *Oubre v. Bank of St. Charles and Trust Co.*, 499 So.2d 602 (La.App. 5 Cir. 1986), *writ denied* 503 So.2d 20 (La. 1987) and *United Talent Associates, Inc. v. Parish of Jefferson*, 457 So.2d 1293 (La.App. 5 Cir. 1984), *writ denied*, 462 So.2d 653 (La. 1985).

Analysis

The peremptory exception of no cause of action is designed to test the legal sufficiency of the petition by determining whether plaintiff is afforded a remedy in law based on the facts alleged in the pleading. *Everything on Wheels Subaru, Inc. v. Subaru South Inc.*, 616 So.2d 1234 (La.1993); *Pelican Publishing Company v. Wilson*, 626 So.2d 721 (La.App. 5 Cir.1993). No evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. La.CodeCiv.Proc. art. 931; *Pelican*, supra at 723. In deciding the exception, the court must accept the well-pleaded allegations of fact as true. *Id.* at 723. The issue at trial is whether, on the face of the petition, plaintiff is legally entitled to the relief sought. *Id.* at 723.

Plaintiffs' petition alleges damages suffered as a result of negligence of the defendants "under the Jones Act, 46 U.S.C. App. 688, and the General Maritime Law Doctrine of Unseaworthiness." Plaintiffs further allege the right to "maintain this action . . . in this Court pursuant to the Saving to Suitors Clause, 28 U.S.C. 1333." After reviewing plaintiffs' petition, it is clear that plaintiffs are afforded a remedy in law based on the facts alleged in the pleading. The trial court therefore erred in maintaining defendants' exception of no cause of action.

With regard to defendants' exception of no right of action, in *Cox Cable v. City of New Orleans*, 624 So.2d 890, 895-89 (La. 1993), the Louisiana Supreme Court held:

> An action can be brought only by a person having a real and actual interest which he asserts. La.Code Civ.Proc. art. 681. When

the facts alleged in the petition provide a remedy to someone, but the plaintiff who seeks the relief for himself is not the person in whose favor the law extends the remedy, the proper objection is an exception of no right of action. This exception raises the question whether the plaintiff has any interest in judicially enforcing the right asserted. La.Code Civ.Proc. art. 927(5); *G.I. Joe Inc. v. Chevron U.S.A., Inc.*, 561 So.2d 62 (La. 1990); *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So.2d 328 (1972).

Again, a review of plaintiffs' petition reveals that the injured plaintiff, Mr. Lejano, *is* the person in whose favor the law extends a remedy. The trial court therefore erred in maintaining defendants' exception of no right of action.

With regards to the doctrine of *forum non conveniens*, La.Code Civ.Procs. art. 123 provides:

> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in ¶ C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or

> omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and in the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court

of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

> C. The provisions of ¶ B shall not apply to claims brought pursuant to 46 USC § 688 (the Jones Act) or federal maritime law.

Louisiana Courts may not dismiss cases for *forum non conveniens* except as provided in this article. *Fox v. Board of Supervisors*, 576 So.2d 978 (La. 1991). A clear reading of article 123(C) leads to the conclusion that the doctrine of *forum non conveniens* is specifically made unavailable in a Jones Act or maritime law case. Moreover, the United States Supreme Court has recently held that the application of Louisiana's *forum non conveniens* rule is not preempted by federal admiralty law. See *Miller v. American Dredging Co.*, 1992 AMC 2336, 595 So.2d 615 (La. 1992), affirmed by *American Dredging Co. v. Miller*, 510 U.S. ___,

1994 AMC 913 (1994).[4] Since article 123(C) precludes dismissal of this Jones Act/general maritime case on the ground of *forum non conveniens*, the trial court erred in dismissing plaintiffs' suit on that basis.

For the foregoing reasons, we order that the judgment below be reversed and that this matter be remanded to the trial court for further proceedings consistent with this opinion.

REVERSED and REMANDED

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[4] *See also Markzannes v. Bermuda Star Line, Inc.*, 1989 AMC 2988, 545 So.2d 537 (La. 1989 *per curiam*), *cert. denied*, 493 U.S. 1043, 1990 AMC 2701 (1990).

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna APR. 17, 1995, 198

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

Feliciano Lejano/Melinda Lejano, v. K. S. Bandak, et al

No. 94 CA 783

Very truly yours,

PETER J. FITZGERALD, JR.
Clerk

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 454-127 DIVISION D

FELICIANO LEJANO AND MELINDA LEJANO

VS.

K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD.

JUDGMENT

(Filed Sep. 21, 1995)

This matter came before the Court on the 28th day of August, 1995 for a hearing on a Motion for Summary Judgment filed herein by the defendants, K/S Bandak and K/S Bandak II.

PRESENT: DAVID VIDRINE AND ARTHUR DUPRE, Attorneys for Plaintiffs;

DAVID B. LAWTON AND KEVIN J. LAVIE, Attorneys for Defendants and Movers.

The defendants' motion was argued, submitted and taken under advisement.

After considering the record and applicable law, and for the written reasons this day assigned, the Court rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that United States law is not applicable to this case. This case is governed by Norwegian or Philippine Law; further,

IT IS ORDERED, ADJUDGED AND DECREED that the forum selection provisions contained in the applicable employment and contractual arrangements are valid and the plaintiffs should file their case in the appropriate forum, Norway or the Philippines, and supply this Court with satisfactory proof that such claim has been filed. If the plaintiffs can show that the defendants are attempting to frustrate their efforts to pursue this claim in a foreign forum, this Court will proceed to adjudicate this claim applying Philippine or Norwegian law.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana this 21st day of September, 1995.

/s/ Walter B. Kollin
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 454-127 DIVISION D

FELICIANO LEJANO AND MELINDA LEJANO

VS.

K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD.

REASONS FOR JUDGMENT

(Filed Sep. 21, 1995)

This Court previously held that there are insufficient contacts with the United States to warrant the application of U.S. law to this case. In reaching this decision, this Court utilized the factors set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines, Limited v. Rhoditis*, 398 U.S. 306 (1970). This case involves an injury to a Philippine seaman aboard a Norwegian flag and Norwegian owned vessel in the high seas. Mr. Lejano was serving pursuant to collective bargaining agreements negotiated in Norway and the Philippines.

There are contractual forum selection provisions negotiated in Mr. Lejano's employment contract, the revised standard employment contract of the Philippine Overseas Employment Administration (POEA) and the collective bargaining agreement between Norwegian shipowners and the Philippine seaman's union. These clauses are prima facie valid and should be enforced unless enforcement would be unreasonable or unjust. *M/S Bremen v. Zapata*, 407 U.S. 1 (1972). This Court holds that

the forum selection and choice of law provisions contained in these contracts are binding and enforceable. *Prado v. Sloman Neptun Schiffahrts*, 611 So. 2d 691 (La. App. 4th Cir. 1992). Accordingly, Mr. Lejano should file his claim in Norway or the Philippines.

Gretna, Louisiana this 21st day of September, 1995.

/s/ Walter B. Kollin
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 454-127 DIVISION D

FELICIANO LEJANO AND MELINDA LEJANO

VS.

K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD., AND K.S. BANDAK II

JUDGMENT ON MOTION FOR NEW TRIAL

(Filed Nov. 16, 1995)

This matter came before the Court on the 7th day of November, 1995.

PRESENT: RICHARD J. DODSON AND JOHN J. MOLAISON, JR., Attorneys for the plaintiffs;

DAVID B. LAWTON AND KEVIN J. LAVIE, Attorneys for defendants.

The motion was argued, submitted and taken under advisement.

After considering the record and the applicable law, and for the written reasons this day assigned, the Court rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed herein by the plaintiffs, Feliciano and Melinda Lejano, be and the same is hereby denied.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana this 16 day of November, 1995.

/s/ Walter B. Kollin
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

No. 454-127 DIVISION D

FELICIANO LEJANO AND-MELINDA LEJANO

VS.

K.S. BANDAK, ASSURANCEFORENINGEN GARD, AND GARD (U.K.) LTD.

REASONS FOR JUDGMENT

(Filed Nov. 16, 1995)

This Court finds the plaintiffs have not presented any evidence which would warrant the granting of a new trial on the motion for summary judgment. This Court has held that the plaintiff should file his claim in the appropriate forum. If he fails to produce satisfactory proof that his claim was filed in the foreign forum his claim may be dismissed with prejudice for failure to comply with the "forum selection" provisions of his employment contract. Further, if the Lejanos produce satisfactory proof that the defendants have attempted to frustrate their efforts to pursue this claim in a foreign forum by raising objections based on the filing of this claim by Lejano in the U.S. first, including but not limited to objections of jurisdiction, prescription, laches or estoppel, the Court may proceed to adjudicate this claim. *Prado v. Sloman Neptun Schiffharts, A. G.*, 611 So. 2d 691 (La. App. 4 Cir. 1992). The plaintiffs have failed to prove that this Court's ruling is clearly contrary to the law and the evidence or that there is a good ground for the granting of the motion. LA. C. CIV. PRO. ARTS. 1972 and 1973.

Gretna, Louisiana this 16th day of November, 1995.

/s/ Walter B. Kollin
JUDGE

FELICIANO LEJANO AND MELINDA LEJANO
VERSUS
K. S. BANDAK, ET AL.

NO. 95-C-1011
COURT OF APPEAL
FIFTH CIRCUIT

WRITS REFUSED.

In his ruling on a motion for summary judgment filed by defendants/respondents, the trial judge took the following action: he ruled that Norwegian or Philippine law is the applicable law for this case and he stated that plaintiff should file suit in one of those forums, under the "applicable employment and contractual arrangements between the parties." He did not dismiss plaintiffs' suit in this jurisdiction and he held open the option that if defendants attempted to frustrate their claim in one of those forums, that the Twenty-Fourth Judicial District Court would proceed to adjudicate the claim.

This disposition by the trial judge is very similar to the disposition approved of by our brothers in the Fourth Circuit Court of Appeal, which is now a final judgment, in an almost identical situation. *Prado v. Sloman Neptun Schiffahrts, A.G.*, 611 So.2d 691 (La.App. 4 Cir.1993), *writ not considered*, 613 So.2d 986 (La.1993). Therefore the trial judge had legal precedent for his action and we find no jurisprudence to the contrary. We agree with and adopt the approval of this type of action given by the Fourth Circuit under these circumstances.

Accordingly, we find no error in the trial judge's astute disposition of the motion for summary judgment filed by defendants in the case sub judice. Therefore, the application is denied.

Gretna, Louisiana, this 9th day of January, 1996.

/s/ FB
JUDGE FRED S. BOWES

/s/ CG
JUDGE
CHARLES GRISBAUM, JR.

/s/ TCW, JR
JUDGE THOMAS C. WICKER, JR.

Feliciano LEJANO and Melinda Lejano

v.

K.S. BANDAK, et al.

No. 96-CC-0337.
Supreme Court of Louisiana,
March 29, 1996.

In re Lejano, Feliciano; – Plaintiff(s); applying for supervisory and/or remedial writs; to the Court of Appeal, Fifth Circuit, No. 95-CW-1011; Parish of Jefferson, 24th Judicial District Court, Div. "D", No. 454-127.

Granted. Remanded to the court of appeal for briefing, argument and opinion.

JOHNSON, J., would deny the writ.

Feliciano LEJANO and Melinda Lejano

v.

K.S. BANDAK, et al.

No. 95-C-1011.
Court of Appeal of Louisiana,
Fifth Circuit.
Jan. 15, 1997.
Writ Granted April 4, 1997.

Richard J. Dodson, David C. Vidrine, Dodson & Vidrine, Baton Rouge and John J. Molaison, Jr., W.J. LeBlanc, Jr., Molaison & LeBlanc Gretna and Arthur D. Dupre, Daigle, Sullivan, Dupre & Aldous, APLC, Metairie, for Plaintiffs, Applicants/Feliciano Lejano and Melinda Lejano.

David B. Lawton, Kevin J. Lavie, Terriberry, Carroll & Yancey, New Orleans, for Defendants/Respondents, K.S. Bandak, et al.

Before BOWES, GRISBAUM, and WICKER, JJ.

BOWES, Judge.

Plaintiff was injured while in international waters off the coast of Florida. He filed suit in Louisiana seeking recovery under the Jones Act, General Maritime Law, and Federal Maritime Law. Quasi-in-rem jurisdiction was obtained by the execution of a non-resident writ of attachment on the vessel while it was docked within the jurisdiction of the district of the 24th Judicial District Court.

Defendants filed exceptions of *no cause* of action, *no right* of action and *forum non conveniens*. On August 3, 1994, the trial court granted all of the peremptory exceptions and dismissed plaintiff's suit, stating:

> IT IS ORDERED, ADJUDGED AND DECREED THAT the Declinatory Exceptions filed herein by the defendants, KS Bandek and KS Bandek II, be and the same are hereby overruled; further,

IT IS ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Cause of Action and No Right of Action filed herein by the defendants, KS Bandek and KS Bandek II, be and the same are hereby maintained and the plaintiffs' demands against the defendants are hereby dismissed with prejudice; further

IT IS ORDERED, ADJUDGED AND DECREED that the doctrine of *forum non conveniens* is applicable to this case and the plaintiffs' suit is dismissed on this basis.

Plaintiffs appealed to *this* Court, which *reversed* the decision of the trial court and *remanded* the case for further proceedings. This Court found that plaintiff *had* stated a cause of action, that plaintiff *was* afforded a right of action, and that the doctrine of forum non conveniens did *not* apply in this Jones Act case.

Defendants filed a motion for partial summary judgment requesting that Norwegian law be held applicable. Plaintiff argued against summary judgment and argued that Philippine law should be applied.

The trial court ruled as follows:

IT IS ORDERED, ADJUDGED AND DECREED that United States Law is not applicable to this case. This case is governed by Norwegian or Philippine Law; further

IT IS ORDERED, ADJUDGED AND DECREED that the forum selection provisions contained in the applicable employment and contractual arrangements are valid and the plaintiffs should file their case in the appropriate forum, Norway or the Philippines, and supply this Court with satisfactory proof that such claim has been filed. If the plaintiff can show that the defendants are attempting to frustrate their efforts to pursue this claim in a foreign forum, this Court will proceed to adjudicate this claim applying Philippine or Norwegian law.

Plaintiffs filed a motion for new trial, which was denied by the trial court. Plaintiffs then filed for writ of review with this Court, which was also denied. Plaintiffs sought writ of review with the Louisiana Supreme Court, which granted plaintiffs' writ and remanded the matter to this Court for briefing argument and opinion.

We have now complied with the directions of the Supreme Court, and on remand have thoroughly examined the issue again. Accordingly, we now affirm the decision of the trial court for the following reasons.

THE DOCTRINE OF LAW OF THE CASE IS NOT APPLICABLE

Plaintiffs first argue that the trial court and this court erred in failing to apply the doctrine of the "Law of the

Case." It is plaintiffs' contention that this Court, in its prior judgment, ruled on the issue of the validity of the forum selection clause, and found that the clause was not enforceable. Having so ruled, the trial court, and this Court on application for writs, are precluded from *again* ruling on whether the forum selection clause was enforceable.

After consideration of the argument advanced by the plaintiff, we hold that in this case, the doctrine of the "Law of the Case" does *not* bar the trial court or this Court from considering whether the forum selection clause was enforceable.

The "law of the case" principle embodies the rule that an appellate court will not reconsider its own rulings of law in the same case. However, the doctrine is *discretionary* and is not applicable in cases of palpable error or when, if the law of the case were applied, manifest injustice would occur. *Vincent v. Ray Brandt Dodge*, 94-291 (La.App. 5 Cir. 3/1/95), 652 So.2d 84, *writ denied*, 95-1247 (La. 6/30/95), 657 So.2d 1034.

A review of the pleadings filed by defendant reflect that defendants filed peremptory exceptions of no cause of action, no right of action and forum non conveniens. In memorandum to the trial court, defendants argued the issue of applicable law, and the forum selection clauses, in support of their allegations that plaintiffs failed to state a cause of action and/or a right of action, and/or that the matter should be dismissed on forum non conveniens. The merits of the substantive legal issue of the enforceability of the contractually created forum selection

requirement was *not before the court* and was *not litigated* in the hearing on procedural exceptions; the trial court did not rule on this issue in its original judgment, which dismissed plaintiff's suit, (see supra).

As observed previously, the plaintiff appealed that decision, which dismissed his suit on exceptions, to this Court. This Court reversed the ruling of the trial court, our holding finding that plaintiffs' petition stated both a cause and right of action under the Jones Act and under federal maritime law, and also finding that the exception of forum non conveniens could not be urged in a Jones Act case. This Court did *not* rule on the issue of whether the forum selection clause contained in the employment contract signed by plaintiff was enforceable. The case was then *remanded* to the trial court for further proceedings.

Thereafter, both sides filed motions for summary judgment. Plaintiffs alleged that Philippine law was applicable to this matter while defendants sought the application of Norwegian law. Thus, it seems that both sides concede that the laws of the United States, and more specifically the Jones Act and the general federal maritime law, are *not applicable* to the case at bar. It was at this juncture that the trial court first considered the issue of enforceability of the forum selection clause found in the employment contract.

After reviewing this matter, we find that this issue, i.e., the enforceability of the forum selection clause, was *never* squarely *before* the trial court *nor* was it *before this Court* in the *prior* proceedings, which raised exceptions of

no cause and/or right of action and of forum non conveniens. The issue was *first* presented to the trial court by the filing of the motions for summary judgment (the rulings of which are at issue in this writ application). Therefore, we cannot say that the trial court, and this Court, without any discussion whatsoever, have already reviewed and determined the issue of whether the forum selections clauses are valid and enforceable. We, therefore, find that the doctrine of the "Law of the Case" does *not* bar consideration of the issues presented to us in this application for review.

STANDARD OF REVIEW

Both sides have filed motions for summary judgment seeking a determination of the applicability of the forum selection clauses contained in plaintiff's employment contract.

A motion for summary judgment is proper when the pleadings, depositions, answers and omissions on file, together with the affidavits submitted, show that there is no genuine issue of material fact, so that mover is entitled to judgment as a matter of law. La.C.C.P. art. 966; *Bijou v. Alton Ochsner Medical Foundation*, 95-3074 (La.9/15/96), 679 So.2d 893.

Likewise, summary judgment is appropriate when all the relevant facts are presented before the court, these facts are undisputed, and the only issue is the ultimate conclusion to be drawn from those facts. *Smith v. Our Lady of the Lake Hosp.*, 93-2512 (La.1994), 639 So.2d 730.

When reasonable minds must inevitably conclude that mover is entitled to summary judgment as a matter of law on the facts before the court, summary judgment is warranted. *Bijou, supra.*

Any decision as to the propriety of a grant of the motion must be made with reference to the substantive law applicable to the case. Only in the context of the applicable substantive law can issues of material fact be ascertained. *Sun Belt Constructors v. T & R Dragline,* 527 So.2d 350 (La.App. 5 Cir.1988).

FORUM SELECTION CLAUSE

Plaintiffs first argue that a forum selection clause is merely a procedural device and is governed by the same rules as forum non conveniens. They argue that because forum non conveniens is not a defense in a Jones Act case or admiralty case, a forum selection clause is automatically unenforceable. We disagree. While both the doctrine of forum non conveniens and a forum selection clause contained in a contract *can* determine the appropriate venue in a case, each originates in a *different* manner and for a *different* purpose. Plaintiffs' statement that the procedural rules applicable to forum non conveniens are equally applicable to the issue of the enforceability of a contract provision which decides the appropriate forum, is a very broad statement and we hold that it is incorrect.

The plaintiffs initially filed this suit alleging a cause of action in federal maritime law and under the Jones Act. The issue presented by *this* writ is the enforceability of a clause in the plaintiff's employment contract. A

contract for hire of a ship or of the officers and sailors to man her is within admiralty jurisdiction. *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961). Thus, this Court is governed by the federal substantive admiralty or maritime law. *Powell v. McDermott Intern., Inc.*, 588 So.2d 84 (La.1991). Under federal admiralty law, a forum selection clause is *prima facie valid*, and will be enforced *unless* is it shown by the resisting party to be "unreasonable" under the circumstances. *M/S Bremen v. Zapata*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). The *M/S Bremen* court further noted that it should be incumbent on the party seeking to escape his contract to show that the trial in the contractual forum will be *so gravely difficult and inconvenient* that he will be *deprived* of his day in court.

In addition, the United States Supreme Court has noted that a heavy burden of proof falls on the party seeking to challenge a forum selection clause in a maritime case to prove that enforcement of the selection clause would be unreasonable or that the clause violated fundamental fairness due to fraud or overreaching. *Carnival Cruise Lines, Inc., v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

Finally, we note that jurisprudence from our state courts *support* a presumption of validity to a forum selection clause. This Court has held that forum selection clauses are legal and binding. A plaintiff trying to set aside such a clause has a heavy burden. *Digital Enterprises, Inc. v. Arch Telecom., Inc.*, 95-30 (La.App. 5 Cir. 6/28/95), 658 So.2d 20.

In *Calzavara v. Biehl & Co.*, 181 So.2d 809, 810 (La.App. 4 Cir.1966), the court noted that the forum selection provision will be enforced *unless* it is *unreasonable*, and the test of reasonableness principally is concerned with the nationalities of the parties involved and the accessibility to them of the court given exclusive jurisdiction by the provision.

In the case before us, the application of the forum selection clause does *not* appear to be unreasonable. Our brethren in the Fourth Circuit have already decided that a contract of employment, *identical* to the one at issue, executed between a Philippine seaman and a Liberian ship, is not a contract of adhesion. *Barcelona v. Sea Victory Maritime, Inc.*, 619 So.2d 741 (La.App. 4 Cir.1993), *writ denied*, 626 So.2d 1179 (La.1993). That case involved multiple claims, including claims under the Jones Act and general maritime law for the wrongful death of a Filipino seaman. In ruling that the forum selection clause *was enforceable*, and that the employment contract was not a contract of adhesion, the court said:

> The employment contracts are one-page documents with the forum selection provision appearing plainly above each plaintiff's signature. A party's signature on a contract establishes a presumption he saw and understood the terms of the contract. *Lazybug Shops, Inc. v. American District Telegraph*, 374 So.2d 183 (La.App. 4 Cir.1979). The plaintiffs offered no evidence to rebut the presumption [that] they had knowledge of the clause. Moreover, plaintiffs were seamen of several years' experience and we can reasonably conclude [that] they were well aware of maritime practice.

As for the *rejection* argument, the plaintiffs could have avoided the clause by simply rejecting the employment as seaman aboard the vessel. Again from the record, it is apparent that such positions are well paid and sought after. The plaintiffs received the benefits from their employment as seamen and we do not believe holding them to this forum selection clause, which is required by the Philippine government, *not the defendant*, is an unreasonable condition of employment. At pp. 745-46. [Emphasis supplied].

In this case it is true that the forum selection clause is required by both the Philippine government and the Norwegian employer. However, it is equally true that the clause was mandated only after negotiations between the Philippine Seamen's union and the Norwegian government, and these negotiations were a part of the collective bargaining agreement entered into by the seaman's union. Furthermore, the clause was on the same page and above the seaman's signature, and is *presumed* to have been seen by him.

Plaintiff also urges that the enforcement of the forum selection provision would be unconscionable, as neither the Norwegian forum nor the Philippine forum provide an adequate remedy for the plaintiff. However, the affidavits of both Filipino and Norwegian attorneys specializing in admiralty law reflect that either jurisdiction *would* provide appropriate remedies for this plaintiff. Ordinarily, our discussion of this issue would include the issue of choice of law, that is, what substantive law would govern this case. However, in this case, both plaintiff and

defendant have admitted that the appropriate choice of law is not law of the United States law, but the law of either the Phillippines [sic] or Norway. We do not believe that applying the substantive law of the appropriate forum, in either of these forums, would deprive the plaintiff of his appropriate legal remedies.

We further note that the clause requiring plaintiff to assert his claim in his home jurisdiction is not unreasonable. The accident occurred in international waters off the coast of Florida, the plaintiff; a Filipino, was taken to a hospital in Miami and then to the Phillippines [sic]; and the accident occurred on a Norwegian vessel. Jurisdiction was obtained in the United States, and more specifically, in Louisiana, by a writ of attachment when the ship was temporarily docked here for a mission or reason that was completely unconnected with plaintiff's claim. There is absolutely *no connexity* between Louisiana and the facts of this case or the claim made therein, and as far as we can tell, none of the witnesses are located in Louisiana. Thus, it appears that Louisiana has absolutely no interest in this case at all.

Finally, we are in accord with the decision of the learned trial judge, who relied on the case of *Prado v. Sloman Neptun Schiffahrts* [sic], A.G., 611 So.2d 691 (La.App. 4 Cir.1992), *writ not considered*, 613 So.2d 986 (La.1993), in rendering a conditional grant of summary judgment in this case. The *Prado* case involved an almost *identical* factual scenario. In *Prado*, the court ruled that it would retain jurisdiction of the case for a limited time, and should defendant attempt to thwart plaintiff's attempt to bring the claim in the Phillippines [sic], it

would exercise that jurisdiction and decide the case utilizing Philippine law. The trial judge here took similar action.

As in *Prado*, it appears from the record before us that the plaintiff's cause of action may be subject to pleas of prescription if now brought in the appropriate forum. For that reason, we agree with the trial judge's decision, which amounts to a stay of the present proceedings, rather than an outright dismissal of the case, so that Mr. Lejano may bring his claim in either the Phillippines [sic] or in Norway. As the court in *Prado* noted:

> In spite of the fact that Louisiana has no material interest in this cause of action, we are compelled to make some suitable disposition of the case which we will accomplish by resorting to Prado's employment contract rather than forum non conveniens. In making that disposition we are guided by the time honored and oft expressed principle that:
>
> Seamen, as wards of the court, are entitled to a careful review when a district court refuses to exercise jurisdiction over their claims. We are convinced that federal courts must remain vigilant in protecting the rights of seaman, whether foreign or domestic, in their relations with their employer. *Castillo v. Spiliada Maritime Corp.*, 937 F.2d 240 (5 Cir.1991).
>
> We are equally committed to the proposition that this Court should be no less zealous in protecting the rights of seaman. In accordance with this principle we are determined that Prado's ability to recover will not be prejudiced

just because he first made a good faith, well argued, diligent, non-frivolous, though unsuccessful attempt to pursue a remedy in Louisiana.

For the foregoing reasons, we order that the judgment below be vacated and that this matter be remanded to the trial court for further proceedings consistent with this opinion. We further order that these proceedings be stayed for six-months from the date of this judgment during which time Prado shall furnish the trial court with satisfactory proof that he has filed his claim in a forum in the Philippines.

It is further ordered that if Prado fails to produce satisfactory proof to the trial court of the filing of his claim in the Philippines within the said six months then the trial court may dismiss this claim with prejudice for failure to comply with the "forum selection" provisions of his employment contract.

It is further ordered that in the event Prado should produce satisfactory proof to the trial court that Asiento has attempted to frustrate his efforts to pursue this claim in a Philippine forum by raising objections based upon the filing of this claim by Prado first in the United States, including but not limited to objections of jurisdiction, prescription, laches or estoppel, then the trial court may proceed to adjudicate this claim in a manner consistent with this opinion and the law of the Philippines. At pp. 703-04.

CONCLUSION

For the above discussed reasons, we again find no error in the decision of the trial court, and again deny plaintiff's application for writs.

WRITS REFUSED; THE APPLICATION DENIED.

Feliciano LEJANO and Melinda Lejano

v.

K.S. BANDAK, et al.

No. 97-CC-0388.
Supreme Court of Louisiana.
April 4, 1997.

Prior report: La.App., 688 So.2d 86.

In re LeJano, Feliciano; LeJano, Melinda; LeJano, Feliciano; LeJano, Melinda; – Plaintiff(s); applying for supervisory and/or remedial writs; to the Court of Appeal, Fifth Circuit, No. 95-CW-1011; Parish of Jefferson, 24th Judicial District Court, Div. "D", No. 454-127.

Granted.

KNOLL, J., not on panel.

REHEARING DENIED:

97-CC-0388 FELICIANO LEJANO AND MELINDA LEJANO v. K. S. BANDAK, ET AL (Parish of Jefferson)
CALOGERO, C.J. LEMMON & KIMBALL, JJ. – would grant rehearing and assign reasons.
KNOLL, J. – not on panel.

SUPREME COURT OF LOUISIANA

No. 97-CC-0388

MAR 27 1998

FELICIANO LEJANO AND MELINDA LEJANO

Versus

K.S. BANDAK ET AL

ON APPLICATION FOR REHEARING

Calogero, C.J., Lemmon and Kimball, J.J., Dissenting from the Denial of the Application for Rehearing.

In the trial court, the defendants filed a motion for summary judgment on the issue of choice of laws. The trial court granted the summary judgment and ruled that Norwegian law applies. Although no pleadings raised the issue, the trial court further ruled that the forum selection clause was valid and enforceable, and accordingly dismissed the motion rather than simply applying Norwegian law in this forum.

After the court of appeal affirmed the summary judgment, this court addressed the forum selection clause and affirmed its validity. On application for rehearing, plaintiffs claim that the trial court, in granting summary judgment on the forum selection clause, did not have (and therefore could not have considered) the information necessary to determine whether the forum selection clause was a contract of adhesion, because no pleadings notified the parties of the need to present evidence on that issue. Although the claim could have been raised earlier, plaintiff may have been misled by the defendant's deficient pleading.

In the interest of justice, we would grant the application for rehearing in part. While we would reaffirm our general conclusion on original hearing that "a forum selection should be enforced absent a clear showing the enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud or overreaching," we would set aside that portion of the summary judgment relating to the validity of this particular forum selection clause and remand the case to the trial court. Defendants then could raise the forum selection clause issue by appropriate pleadings,[1] and both sides would have the opportunity to present relevant evidence.

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[1] *See* Robert A. Casad, *Jurisdiction in Civil Actions* §§ 1.07, 3.01[5][c][iv] (2d ed. 1991).

Article III, Section 2, Clause 1 of the United States Constitution provides:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a state and Citizens of another state; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. § 1333, commonly known as the "saving to suitors" clause, provides in pertinent part as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> > (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

46 U.S.C. § 688, commonly known as the Jones Act, provides in pertinent part as follows:

> (a) Application of railway employee statutes; jurisdiction
>
> > Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury,

> and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The provisions of 45 U.S.C. § 55 provides in pertinent part:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . . "

The provisions of 45 U.S.C. § 56 provide in pertinent part:

* * *

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter

shall be concurrent with that of the courts of the several States."

The provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, September 16, 1988 provide in pertinent part:

"Prorogation of Jurisdiction", Article 17, Section 5:

"In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen."

MEMORANDUM ORDER NO. 271

DESIGNATING THE CHAIRMAN AND MEMBERS OF THE PRESIDENTIAL FACT-FINDING AND POLICY ADVISORY COMMISSION ON THE PROTECTION OF OVERSEAS FILIPINOS

Pursuant to Executive Order No. 231 dated March 20, 1991, the following are hereby designated to constitute the Presidential Fact-Finding and Policy Advisory Commission on the Protection of Overseas Filipinos.

Honorable Emilio A. Gancayco – Chairman

REPUBLIC ACT NO. 8042

AN ACT TO INSTITUTE THE POLICIES OF OVERSEAS EMPLOYMENT AND ESTABLISH A HIGHER STANDARD OF PROTECTION AND PROMOTION OF THE WELFARE OF MIGRANT WORKERS, THEIR FAMILIES AND OVERSEAS FILIPINOS IN DISTRESS, AND FOR OTHER PURPOSES.

SECTION 1: *Short Title* – This Act shall be known and cited as the "Migrant Workers and Overseas Filipinos Act of 1995."

SEC. 2: *Declaration of Policies* –

(a) In the pursuit of an independent foreign policy and while considering national sovereignty, territorial integrity, national interest and the right to self-determination paramount in its relations with other states, the State shall, at all times, uphold the dignity of its citizens

whether in country of overseas, in general, and Filipino migrant workers, in particular.

(b) The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employed opportunities for all. Towards this end, the State shall provide adequate and timely social, economic and legal services to Filipino migrant workers.

(e) Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. In this regard, it is imperative that an effective mechanism be instituted to ensure that the rights and interest of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, documented or undocumented, are adequately protected and safeguarded.

I. DEPLOYMENT

SEC. 4: *Deployment of Migrant Workers* – The State shall deploy overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected. The government recognizes any of the following as a guarantee on the part of the receiving country for the protection and the rights of overseas Filipino workers:

(a) It has existing Labor and social laws protecting the rights of migrant workers.

SEC. 10: *Money Claims* – Notwithstanding any provision of law to the contrary, the Labor Arbiters of the National Labor Relations Commission (NLRC) shall leave the original and exclusive jurisdiction to hear and decide,

within ninety (90) calendar days after the filing of the complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages.

V. THE LEGAL ASSISTANT FOR MIGRANT WORKERS AFFAIRS

SEC. 24: *Legal Assistant for Migrant Workers Affairs* – There is hereby created the position of Legal Assistant for Migrant Workers Affairs under the Department of Foreign Affairs who shall be primarily responsible for the provision and overall coordination of all legal assistance services to be provided to Filipino migrant workers as well as overseas Filipinos in distress. He shall have the rank, salary and privileges equal to that of an undersecretary of said Department.

(c) To tap the assistance of reputable law firms and the Integrated Bar of the Philippines and other bar association to complement the government's efforts to provide legal assistance to our migrant worker;

(d) To administer the legal assistance fund for migrant workers established under Section 25 hereof and to authorize disbursements therefrom in accordance with the purposes for which the fund was set up; and

(e) To keep and maintain the information system as provided in Section 20.

The Legal Assistant for Migrant Workers Affairs shall have authority to hire private lawyers, domestic or foreign, in order to assist him in the effective discharge of the above functions.

SEC. 25: *Legal Assistance Fund* – There is hereby established a legal assistance fund for migrant workers, hereinafter referred to as the Legal Assistance Fund, in the amount of One hundred million pesos (100,000,000.00) to be constituted from the following sources:

* * *

SEC. 26: *Uses of the Legal Assistance Fund* – The Legal Assistance Fund created under the preceding section shall be used exclusively to provide legal services to migrant workers and overseas Filipinos in distress in accordance with the guidelines, criteria and procedures promulgated in accordance with Section 24(a) hereof. The expenditures to be charged against the Fund shall include the fees for the foreign lawyers to be hired by the Legal Assistant for Migrant Workers Affairs to represent migrant workers facing charges abroad, bail bonds to secure the temporary release of workers under detention, court fees and charges and other litigation expenses.

VI. COUNTRY – TEAM APPROACH

SEC. 27: *Priority Concerns of Philippine Foreign Service Posts* – The country-team approach, as enunciated under Executive Order No. 74, series of 1993, shall be the mode under which Philippine embassies or their personnel will operate in the protection of the Filipino migrant

workers as well as in the promotion of their welfare. The protection of the Filipino migrant workers and the promotion of their welfare, in particular, and the protection of the dignity and fundamental rights and freedoms of the Filipino citizen abroad, in general, shall be the highest priority concerns of the Secretary of Foreign Affairs . . .

VII. DEREGULATION AND PHASE-OUT

SEC. 30: *Gradual Phase-out of Regulatory Functions* – Within a period of five (5) years from the effectivity of this Act, the DOLE shall phase-out the regulatory functions of the POEA . . .

EXECUTIVE ORDER NO. 231
CREATING THE PRESIDENTIAL FACT-FINDING AND POLICY ADVISORY COMMISSION ON THE PROTECTION OF OVERSEAS WORKERS

WHEREAS, recent events have evoked the nation's serious concern for and recognition of overseas Filipinos;

* * *

WHEREAS, certain claims and assertions as well as accusations have been made against some officials of the Philippine Government in connection with its efforts to protect overseas Filipinos;